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Removing the "Natural Distaste" from the Mouth of the Supreme Court with a Criminal Fraud Amendment to ERISA's Anti-Alienation Rule

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NOTE

REMOVING THE “NATURAL DISTASTE” FROM THE MOUTH OF THE SUPREME COURT WITH A CRIMINAL FRAUD AMENDMENT TO ERISA’S ANTI- ALIENATION RULE

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INTRODUCTION

Congress enacted the Employee Retirement Income Security Act of 1974 ("ERISA")¹ principally to ensure that employees who accrue promised retirement benefits actually receive such benefits for use in their retirement years.² ERISA accomplishes this pri-

¹ Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. § 1001 (1988)). A given ERISA provision can be cited to any one of three sources: as part of the labor title of the United States Code, Title 29; as an Internal Revenue Code ("I.R.C.") provision, title 26 of the United States Code; and as part of a commercial edition of ERISA, published by BNA, CCH, and Prentice Hall. This confusing numbering is due to the fact that the I.R.C. "tends to duplicate the substantive regulation of ERISA . . . on such matters as funding and vesting." JOHN H. LANGBEIN & BRUCE A. WOLK, *PENSION AND EMPLOYEE BENEFIT LAW* 72 (1990). Courts customarily use United States Code numbers together with an I.R.C. citation, if applicable. *Id.* at 73. ERISA attorneys, on the other hand, tend to prefer the commercial editions of ERISA. *Id.* This Note, commensurate with the tendency of the courts and in the interests of brevity, gives only the citation to title 29 of the United States Code and, when applicable, a corresponding citation to the I.R.C. For a listing of ERISA commercial edition sections to parallel title 29, see STEPHEN R. BRUCE, *PENSION CLAIMS-RIGHTS AND OBLIGATIONS* 777-83 (2d ed. 1993).

² *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375 (1980); H.R. REP. NO. 807, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 4670, 4676. Congress found with respect to the status of pension plans after its ten year study:

[D]espite the enormous growth in [pension] plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting [and other] provisions in such plans [I]t is therefore desirable in the interests of employees and their beneficiaries . . . that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

29 U.S.C. § 1001(a) (1988). Furthermore, in its declaration of ERISA policy Congress averred:

It is hereby declared to be the policy of this Act to protect . . . the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans,

marily through its nonforfeiture ("vesting")³ and anti-alienation ("spendthrift")⁴ provisions.⁵ The former protects the employee from his employer by prohibiting forfeiture of pension benefits once an employee meets certain minimum requirements, at which point he becomes vested.⁶ The latter protects the employee from his own spendthrift nature and from his creditors. Specifically, the anti-alienation provision requires that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated."⁷ Together with ERISA's express preemp-

and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. § 1001(b) (1988). In yet another declaration of policy, Congress stressed the improvement of the pension plan system by requiring vesting, minimum employer funding of plans, and plan termination insurance. 29 U.S.C. § 1001(c) (1988).

The push for comprehensive federal regulation of private pension plans, which eventually became ERISA in 1974, began with the so-called "Studebaker Incident." See LANGBEIN & WOLK, *supra* note 1, at 53. In December of 1963, Studebaker closed its automobile manufacturing plant in South Bend, Indiana and terminated its pension plan pursuant to an agreement with the United Auto Workers. *Id.* at 54. As a result of massive underfunding of pension liabilities, "approximately 4,000 employees, aged 49 to 59, who had at least ten years of service . . . and whose pension benefits had therefore vested," were denied the full pension benefits they had counted on for use in their retirement years, and only "received lump-sum payments equal to about 15% of the actuarial value of their accrued pension benefits." *Id.*

Although ERISA was not enacted until 11 years later, the Studebaker Incident served as a "battle cry" for major private pension overhaul. *Id.* at 54, 55. For general discussions depicting the history of pension plans prior to ERISA's enactment and the policy concerns leading to its enactment, see Snyder, *Employee Retirement Income Security Act of 1974*, 11 WAKE FOREST L. REV. 219 (1975); Note, *The Employee Retirement Income Security Act of 1974: Policies and Problems*, 26 SYRACUSE L. REV. 539 (1975).

³ 29 U.S.C. § 1053(a) (1988 & Supp. V 1993); see I.R.C. § 411 (1994).

⁴ 29 U.S.C. § 1056(d)(1) (1988); I.R.C. § 401(a)(13) (1994). In addition to the vesting and anti-alienation requirements, ERISA contains several other requirements to ensure that an employee's pension expectations are not defeated. See 29 U.S.C. §§ 1051-1061 (1988 & Supp. V 1993) (relating to employee participation and vesting rules); 29 U.S.C. §§ 1081-1085 (1988 & Supp. V 1993) (establishing plan minimum funding standards to increase pension plan solvency); 29 U.S.C. §§ 1101-1114 (1988 & Supp. V 1993) (prescribing fiduciary standards and circumstances giving rise to trustee liability for breach); 29 U.S.C. §§ 1341-1348 (1988 & Supp. V 1993) (relating to plan termination insurance).

⁵ It should be noted that ERISA's nonforfeiture and anti-alienation rules do not apply to ERISA qualified employee welfare plans. See *Mackey v. Lanier Collections Agency & Serv., Inc.*, 486 U.S. 825 (1988).

⁶ See *infra* part I (discussing vesting and forfeiture).

⁷ 29 U.S.C. § 1056(d)(1) (1988). The legislative history pertaining to the purpose of ERISA's anti-alienation rule is sparse. *E.g.*, *Ellis Nat'l Bank v. Irving Trust Co.*, 786 F.2d 466, 470 (2d Cir. 1986). In its entirety, the legislative history of the anti-alienation rule is as follows:

tion scheme,⁸ these provisions generally secure a retirement nest egg for the employee and his dependents.

Under the conference substitute, a plan must provide that benefits under the plan may not be assigned or alienated. However, the plan may provide that after a benefit is in pay status, there may be a voluntary revocable assignment (not to exceed 10 percent of any benefit payment) by an employee which is not for the purposes of defraying the administrative costs of the plan. *For purposes of this rule, a garnishment or levy is not to be considered a voluntary assignment.* Vested benefits may be used as collateral for reasonable loans from a plan, where the fiduciary requirements of the law are not violated.

H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.A.N. 5038, 5061 (emphasis added) (citation relating to effective date of rule omitted). One commentator has offered a logical explanation for the paltry legislative history on the purpose of the anti-alienation rule—"the purpose is too obvious for words." LANGBEIN & WOLK, *supra* note 1, at 431. "The rule requires that the plan prevent the participant from doing indirectly what most plans forbid directly, namely, spending retirement savings before retirement." *Id.*

Treasury Department regulations further reinforce the anti-alienation provision. See Treas. Reg. § 1.401(a)-13(b)(1) (1994) ("[A] trust will not be [tax] qualified unless the plan of which the trust is a part provides that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process.").

ERISA's anti-alienation provision and the Treasury Regulation promulgated under it bear a striking resemblance, both in language and purpose, to the spendthrift clauses commonly seen in trust instruments. See LANGBEIN & WOLK, *supra* note 1, at 431. A typical spendthrift clause states language similar to the following, taken from a litigated trust instrument: "Each beneficiary hereunder is hereby restrained from alienating . . . or in any manner assigning his . . . interest . . . and is without power to do so, nor shall such interest . . . be subject to his . . . liabilities . . . nor to judgment or other legal process, . . . or claims of creditors or others." *Shelley v. Shelley*, 354 P.2d 282, 284 (Or. 1960).

Despite this similarity, ERISA's anti-alienation provision differs significantly from spendthrift trust law in that it is mandatory rather than exceptional. LANGBEIN & WOLK, *supra* note 1, at 431. Notably ERISA's scheme provides only two creditor exceptions—for federal tax liens, see *infra* part II.A.4., and family support judgments, see *infra* part II.A.3.—to its spendthrift rule, whereas trust law contains several exceptions relating to a spendthrift beneficiary's creditors. See IIA AUSTIN W. SCOTT, *THE LAW OF TRUSTS* §§ 157.2-157.5 (4th ed. 1987) (noting creditor exceptions for provision of necessities, state and federal taxes, and others). Moreover, as spendthrift trust law is exceptional rather than mandatory, "[i]t may well be held that it is against public policy to permit the beneficiary of a spendthrift trust to enjoy an income under the trust without discharging his tort liabilities to others." *Id.* § 157.5, at 220. At the very least, it seems it would be easier for courts to create exceptions for tort claimants in the area of spendthrift trust law when a private citizen (referred to as the settlor), rather than Congress, has imposed the spendthrift terms. *Id.* at 220, 222.

⁸ ERISA's preemption scheme states: "Except as provided in subsection (b) [the "savings clause"], [ERISA] shall supersede any and all state laws insofar as they may now or hereafter relate to any [ERISA qualified plan] . . ." 29 U.S.C. § 1144(a) (1988) (emphasis added). The savings clause exempts, among other things, "any law of any State which regulates insurance, banking, or securities," 29 U.S.C. § 1144(b)(2)(A)

Within the text of the ERISA statute, Congress provided certain statutory exceptions to the anti-alienation rule.⁹ In addition, several courts have crafted exceptions to the rule since ERISA's

(1988), and "any generally applicable criminal law of a State," 29 U.S.C. § 1144(b)(4) (1988), from the broad sweep of ERISA's preemption provisions. Furthermore, in the so-called "deemer clause," Congress provided that no ERISA qualified pension plan or trust established thereunder "shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies or investment companies." 29 U.S.C. § 1144(b)(2)(B) (1988).

The key phrase in ERISA's preemption provision is "relate to." The Supreme Court has emphasized the broad sweep of the preemption clause by giving the phrase "its broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan 'in the normal sense of the phrase if it has a connection with or reference to such a plan.'" *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)). Furthermore, the preemption clause does not merely preempt state laws relating to subject matter expressly covered by ERISA; instead, the legislative history indicates the clause's preemptive powers are "as broad as its language." *Shaw*, 463 U.S. at 98 (citing H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 383 (1974); S. CONF. REP. NO. 1090, 93d Cong., 2d Sess. 383 (1974)). ERISA's preemption scheme was designed to avoid "[a] patchwork scheme of regulation," *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 11 (1987), and to "eliminat[e] the threat of conflicting or inconsistent State and local regulation of employee benefit plans," 120 CONG. REC. 29197, 29933 (1974) (statement of Sen. Williams), so as to serve an "important policy underlying ERISA: uniform national treatment of pension benefits." *Patterson v. Shumate*, 112 S. Ct. 2242, 2250 (1992). Thus, ERISA has been held to preempt, for example, state testamentary laws, *see MacLean v. Ford Motor Co.*, 831 F.2d 723, 728 (7th Cir. 1987), and a myriad of other state laws including state garnishment laws. *See General Motors Corp. v. Buha*, 623 F.2d 455, 463 (6th Cir. 1980).

Federal law, on the other hand, reigns supreme in the employee benefit field, as ERISA's provisions are not to "be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." 29 U.S.C. § 1144(d) (1988).

With respect to the anti-alienation rule, despite this broad supremacy language, the Supreme Court has indicated that this clause is perhaps not as sweeping as its language suggests. The Supreme Court declined an invitation to permit the remedial provisions of a federal labor statute to override ERISA's bar on alienation. *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 375 (1990). It did not view that labor statute as being "modified, impaired or superseded" by ERISA because if such a view was accepted, "ERISA's anti-alienation provision would be inapplicable whenever a judgement creditor relied on the remedial provisions of a federal statute. Such an approach would eviscerate the protections of . . . [the anti-alienation rule], and . . . [it] declined to adopt so broad a reading of . . . [ERISA's federal law supremacy language]." *Id.*; *see infra* part II.D.1. (suggesting Supreme Court's rationale here may negate one of presently recognized exceptions to anti-alienation rule created by state court). Thus, it can be seen that ERISA's preemption scheme indirectly reinforces the anti-alienation provision.

⁹ *See infra* part II.A.

enactment.¹⁰ One judicial exception, followed by the Tenth and Eleventh Circuits prior to 1990, maintained that ERISA's anti-alienation rule does not protect the pension benefits of an employee who has engaged in criminal acts at the expense of his employer (the "employee wrongdoing" exception).¹¹ In contrast, the Second and Sixth Circuits reached the opposite conclusion and allowed the anti-alienation provision to protect the pension benefits of employees who had criminally defrauded their employers.¹² In 1990, the United States Supreme Court, in *Guidry v. Sheet Metal Workers National Pension Fund*,¹³ resolved this conflict among the circuits in favor of the employee-wrongdoer by broadly pronouncing that there should be no "generalized equitable exception—either for employee malfeasance or for criminal misconduct—to ERISA's prohibition on the assignment or alienation of pension benefits."¹⁴ The Court noted the "natural distaste for the result . . . [it] reach[ed],"¹⁵ but emphasized that it is solely the role of Congress to create such an exception.¹⁶ Despite Supreme Court invitation, Congress has not addressed the gross inequity created by ERISA's provisions as construed by the *Guidry* Court.¹⁷ Al-

¹⁰ See *infra* parts II.C. and II.D.

¹¹ See *St. Paul Fire & Marine Ins. Co. v. Cox*, 752 F.2d 550 (11th Cir. 1985); *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 856 F.2d 1457 (10th Cir. 1988), *rev'd*, 493 U.S. 365 (1990); see also *infra* part III.A. (discussing *Cox* and other pre-*Guidry* employee wrongdoing cases).

¹² See *United Metal Products Corp. v. National Bank*, 811 F.2d 297 (6th Cir. 1987) *cert. dismissed*, 485 U.S. 1017 (1988); *Ellis Nat'l Bank v. Irving Trust Co.*, 786 F.2d 466 (2d Cir. 1986); see also *infra* part III.A. (discussing these and other pre-*Guidry* employee wrongdoing cases).

¹³ 493 U.S. 365 (1990).

¹⁴ *Id.* at 376.

¹⁵ *Id.* at 377.

¹⁶ *Id.*

¹⁷ The courts have been calling for the enactment of a fraud amendment since at least 1982. See *Guidry*, 493 U.S. at 377 (noting "natural distaste" for result); *United Metal Products Corp. v. National Bank*, 811 F.2d 297, 300 (6th Cir. 1987) (noting despite presentment of "almost ideal case for creation of an implied exception to pension anti-alienation laws," ERISA compels unjust result); *Id.* at 300-01 (Wellford, C.J., dissenting) (noting Congress could not have intended result reached by majority); *Ellis Nat'l Bank v. Irving Trust Co.*, 786 F.2d 466, 471 (2d Cir. 1986) ("Despite its equitable appeal, . . . [a] 'criminal misconduct' exception . . . [would] in our view undermine[] a fundamental purpose of ERISA that we believe should be modified, if at all, only by Congress."); *Mills v. Mills*, 790 F. Supp. 172, 177 (S.D. Ohio 1992) (sharing "natural distaste" for result compelled by *Guidry* and ERISA); *Vink v. SHV N. Am. Holding Corp.*, 549 F. Supp. 268, 273 (S.D.N.Y. 1982) (noting "if ever there were a case to carve out a 'fraud' exception," this is it, but ERISA compels opposite result); *Pomeranke v. Williamson*, 478 N.W.2d 800, 802 (Minn. Ct. App. 1991) (acknowledging "natural distaste"); see also Ronald I. Kirschbaum, *ERISA Spendthrift Rules - It Just*

lowing *Guidry* to serve as precedent in subsequent employee wrongdoing cases and potentially deter defrauded employers from bringing suit to recoup their losses on behalf, albeit indirectly, of its employees, is contrary to recognized principles of restitution, equity, spendthrift trust law, and the prevention of unjust enrichment. This result, despite legislative inaction, cannot be attributed to congressional design.

This Note contains six parts. Part I explains the mechanics of ERISA's nonforfeiture rule as it relates to the anti-alienation rule and draws a distinction between the two rules to identify the impediments to creating a criminal fraud exception. Part II compiles the presently recognized exceptions to ERISA's anti-alienation provision. Part III reviews the employee wrongdoing cases that preceded *Guidry* and examines those cases decided after it. Part IV proposes a criminal fraud amendment to ERISA's anti-alienation rule. Part V examines the reasons why Congress is reluctant to enact such an amendment. As an alternative, Part VI calls for the Supreme Court to reconsider the position it adopted in *Guidry* and suggests a legal method by which the judiciary could create an exception for criminal fraud.

I. NONFORFEITURE AS IT RELATES TO ANTI-ALIENATION

Except as it relates to the anti-alienation provision, ERISA's nonforfeiture rule is beyond the scope of this Note. A basic understanding of this rule, however, is necessary for an appreciation of this anti-alienation rule and the employee wrongdoing cases discussed herein.

A forfeiture must be distinguished from an alienation. A forfeiture results in a reversion of pension benefits back to the employer. An alienation, on the other hand, results in the assignment, garnishment, or attachment of an employee's pension benefits by a third party. In some of the employee wrongdoing cases discussed herein, it is important to note that employers were not seeking to effect a reversion of a convicted employee's pension ben-

Shouldn't Be This Hard, 11 CAMPBELL L. REV. 29, 46-52 (1988) (exploring inequity of employee wrongdoing cases); Note, *Employee Theft and ERISA: A Proposed Amendment to Garnish Pension Benefits*, 10 CARDOZO L. REV. 315, 338-40 (1988) [hereinafter *Employee Theft and ERISA*] (noting inequity of wrongdoer cases which rejected implied fraud exception and proposing model amendment); Comment, *ERISA-Exceptions to the Anti-Alienation Provision: Strengthening ERISA's Protection through a Fraud Amendment*, 10 W. NEW. ENG. L. REV. 317, 352-57 (1988) [hereinafter *Strengthening ERISA's Protection*] (same).

efits through forfeiture, but rather to garnish the pension benefits of the defalcating employees that had stolen from them.¹⁸ ERISA's nonforfeiture provision mandates that "[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age."¹⁹ Thus, forfeiture, such as reversion back to the employer, of vested rights are prohibited except as expressly provided in ERISA.²⁰

There are three ways for an employer to comply with ERISA's vesting requirements: immediate vesting, cliff vesting, and graduated vesting.²¹ As the name suggests, pension plans that provide for immediate vesting require that each employee's pension benefits be fully vested at all times; there is no possibility, therefore, of forfeiture of an employee's pension benefits even when the employee has left the employer.²² Far more common than immediate vesting is a cliff-vesting schedule, under which an employee's pension benefits are wholly forfeitable and do not become wholly vested until he satisfies a minimum number of years of service.²³ Currently, ERISA sets the maximum allowable period for cliff-vesting at five years,²⁴ so that an employee's benefits are wholly forfeitable until he completes five years of service.²⁵ In contrast, graduated vesting affords an employee greater forfeiture protection as his years of service increase.²⁶ Currently, ERISA permits

¹⁸ See, e.g., *Vink*, 549 F. Supp. at 268 (discussed *infra* part III.A.).

¹⁹ 29 U.S.C. § 1053(a) (1988 & Supp. V 1993); see I.R.C. § 411 (1988 & Supp. V 1993).

²⁰ *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981); see 29 U.S.C. § 1053(a)(3) (1988) (enumerating grounds for permissible forfeiture).

²¹ LANGBEIN & WOLK, *supra* note 1, at 93-94. Immediate vesting is uncommon but is exemplified by the defined contribution plan of the TIAA-CREF system. *Id.* at 93.

²² *Id.*

²³ *Id.* at 94.

²⁴ 29 U.S.C. 1053(a)(2)(A) (1988); see *Freeman v. Central States, Southeast & S. Areas Pension Fund*, 32 F.3d 90, 93 (4th Cir. 1994) (stating if single-employer plan chooses "cliff" vesting, ERISA requires that cliff be encountered after no more than five years); *Moeller v. Bertrang*, 801 F. Supp. 291, 296 (N.D.S.D. 1992) (describing defendant's five-year cliff vesting plan).

²⁵ See *Swaida v. IBM Retirement Plan*, 570 F. Supp. 482 (S.D.N.Y. 1983) (explaining that ERISA formerly allowed 10 year cliff vesting and, therefore, employee with 9 years and 11 months service could receive no pension benefits), *aff'd per curiam*, 728 F.2d 159 (2d Cir.), *cert. denied*, 469 U.S. 874 (1984); LANGBEIN & WOLK, *supra* note 1, at 94 (as originally enacted in 1974, ERISA allowed ten-year cliff vesting).

²⁶ LANGBEIN & WOLK, *supra* note 1, at 94 (explaining graduated vesting); see *Stewart v. National Shopmen Pension Fund*, 730 F.2d 1552, 1558 n.12 (D.C. Cir.)

seven year graduated vesting.²⁷ At least a portion of an employee's benefits, therefore, could be forfeited prior to the completion of seven years of service.²⁸ ERISA, however, mandates that an employee's rights to "benefit[s] derived from his own contributions [be in all events] nonforfeitable."²⁹

Prior to the enactment of ERISA, a common scenario under which an employee forfeited his pension benefits occurred when the employer invoked a so-called "bad boy" clause.³⁰ These clauses generally gave employers discretion to decide whether an employee would forfeit his vested pension benefits because of alleged acts of dishonesty or fraud, or in the case of a former employee, for competing with his former employer.³¹ For all intents and purposes, ERISA foreclosed the use of "bad boy" clauses, as its vesting rules provide no exception allowing for the imposition of forfeiture except, of course, for the periods permitted under ERISA's regular vesting schedules.³²

(stating pension plan can provide for graduated vesting), *cert. denied*, 469 U.S. 834 (1984).

²⁷ 29 U.S.C. § 1053(a)(2)(B) (1988); see I.R.C. § 411(a)(2)(B) (1988); *Freeman*, 32 F.3d at 93 n.8 (single-employer plans may delay full vesting for up to seven years as long as partial vesting is phased in according to schedule prescribed in 29 U.S.C. § 1053(d)(2)(B) (1988)).

²⁸ See LANGBEIN & WOLK, *supra* note 1, at 93-98 (discussing workings of vesting schedules); Russell K. Osgood, *Qualified Pension and Profit-Sharing Plan Vesting: Revolution Not Reform*, 59 B.U. L. REV. 452, 456-57 (1979) (same).

²⁹ 29 U.S.C. § 1053(a)(1) (1988), I.R.C. § 411(a)(1) (1988).

³⁰ See *Ellis Nat'l Bank v. Irving Trust Co.*, 786 F.2d 466, 470 n.4 (2d Cir. 1986) (stating "bad boy" defense was used by employers who have sought to forfeit on paying benefits); *Winer v. Edison Bros. Store Pension Plan*, 593 F.2d 307, 311 (8th Cir. 1979) (stating that plans contained "bad boy" clauses which denied employees their otherwise nonforfeitable pension benefits).

³¹ *Vink v. SHV N. Am. Holding Corp.*, 549 F. Supp. 268, 270 (S.D.N.Y.); see *Nedrow v. MacFarlane & Hays Co. Employees' Profit Sharing Plan & Trust*, 476 F. Supp. 934, 935-36 (E.D. Mich. 1979) (citing text of typical "bad boy" provision); John W. Lee, *ERISA's "Bad Boy": Forfeiture For Cause in Retirement Plans*, 9 LOY. U. CHI. L.J. 137, 161-68 (1977) (discussing "bad boy" clauses that preceded ERISA); *Ellis Nat'l Bank*, 786 F.2d at 470 n.4; *Winer*, 593 F.2d at 311.

³² See 29 U.S.C. §§ 1053(a)(2)-(3) (Supp. V 1993) (discussing vesting schedules); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1980) (noting that forfeitures of vested rights are prohibited except as expressly provided in 29 U.S.C. § 1053(a)(3)); *Winer*, 593 F.2d at 311 ("The legislative history is clear . . . that . . . [ERISA's vesting provisions were] designed, in part, to prevent further enforcement of 'bad boy' clauses."); H.R. REP. NO. 807, 93d Cong., 2d Sess. 60 (1974), *reprinted in* 1974 U.S.C.A.A.N. 4639, 4726 (citation omitted) ("[A] vested benefit is not to be forfeited because the employee later went to work for a competitor, or in some other way was considered 'disloyal' to the employer."). *But see* Gary V. Lawson & Roberta Casper Watson, *Forfeiture-for-Cause "Bad Boy" Clauses: Is There Any Life Left After ERISA? - Confusion in the Arena?*, 60 TAXES 827, 828 (1982) (emphasis added) (noting "limited

As was stated earlier, this Note addresses the distinction between forfeiture and alienation because in most employee wrongdoing cases the employer seeks to effect an alienation, and not a forfeiture, of the pension benefits of an employee who has defrauded the employer. This distinction is important because courts have proceeded under the erroneous assumption that both the nonforfeiture and anti-alienation rules are impediments to creating an exception for criminal fraud, when in reality only the anti-alienation rule should have been deemed as such an impediment.³³ Furthermore, when the Department of Labor ("DOL") joined as *amicus curiae* to contest the creation of a criminal fraud exception, it did so in a case in which the employer was acting in the role of forfeitor and not alienator.³⁴ Subsequent courts, however, construed the DOL's appearance to mean that it disfavored a criminal fraud exception when an employer sought not to forfeit, but to alienate, an employee's pension benefits.³⁵ It is suggested, however, that when the DOL joined as *amicus*, it was concerned not with an exception to the alienation mandate where an employee has been convicted of embezzlement, but only with the enforcement of "bad boy" clauses, the use of which ERISA was intended to foreclose.³⁶ It is misleading, therefore, to state that the DOL was against a criminal fraud exception in all cases.

bad boy" clauses "have been enforced by the courts . . . because the employer utilized a *vesting schedule more liberal than those required by ERISA*"; *Montgomery v. Lowe*, 507 F. Supp. 618, 621 (S.D. Tex. 1981) ("[A]n employer may cause interests to vest sooner, or to a greater extent, than ERISA mandates. The employer's generosity entitles it to subject the 'excess' vested interest to any forfeiture conditions it chooses to impose, including a 'bad boy' clause."); Treas. Reg. § 1.411(a)-4(a) (1994) ("To the extent that rights are not required to be nonforfeitable to satisfy the minimum vesting standards . . . they may be forfeited . . ."). See also *infra* part I (discussing "bad boy" clauses as they relate to anti-alienation rule and employee wrongdoing cases).

³³ See, e.g., *Vink*, 549 F. Supp. 268 (discussed *infra* part III.A.).

³⁴ See *Winer*, 593 F.2d at 310; *infra* note 98 (discussing *Vink* case and DOL position).

³⁵ See *Vink*, 549 F. Supp. at 271; *Ellis Nat'l Bank v. Irving Trust Co.*, 786 F.2d 466, 471 (2d Cir. 1986); *United Metal Products Corp. v. National Bank*, 811 F.2d 297, 299 (6th Cir. 1987), *cert. dismissed*, 485 U.S. 1017 (1988). For a discussion of these and other employee wrongdoing cases, see *infra* part III.A.

³⁶ See *supra* note 32 and accompanying text (citing legislative materials evincing intent to disallow "bad boy" enforcement).

II. THE PRESENTLY RECOGNIZED EXCEPTIONS TO ERISA'S ANTI-ALIENATION PROVISION

A. *The Statutory Exceptions*

1. The Ten Percent Exception

An employee (the plan participant) can make a voluntary and revocable assignment of not more than ten percent of any pension benefit when the plan is in pay status.³⁷

2. Loans

Under certain circumstances, a plan participant can obtain a loan from the pension plan.³⁸ These loans, however, may carry potential adverse tax consequences under ERISA's sister provisions in the Internal Revenue Code ("IRC").³⁹

3. The Family Support Exception

The Retirement Equity Act of 1984 ("REA")⁴⁰ amended ERISA to provide that the anti-alienation rule does not apply to assignments made pursuant to a "qualified domestic relations order" ("QDRO").⁴¹ A QDRO is defined as a state judgment entered in connection with, *inter alia*, divorce and child support proceedings.⁴²

³⁷ 29 U.S.C. § 1056(d)(2) (1988); see *In re Pulley*, 111 B.R. 715, 744 (Bankr. N.D. Ind. 1989) (stating pension plan may delay voluntary revocable assignment not exceeding 10%); *Commercial Mortgage Ins. Inc. v. Citizen Nat'l Bank*, 526 F. Supp. 510 (N.D. Tex. 1981) (same); see also *supra* note 7 (citing legislative history with respect to 10% exception).

³⁸ 29 U.S.C. § 1056(d) (2) (1988). The loan must be "secured by the participant's accrued nonforfeitable benefit." *Id.* Although loans to interested parties of a pension plan are generally prohibited by ERISA, see 29 U.S.C. § 1106(a)(1)(B) (1988), secured loans to plan participants are specifically exempted from the prohibited transactions section of ERISA. See 29 U.S.C. § 1108(b)(1) (1988); see also *supra* note 7 (citing legislative history with respect to employee loans).

³⁹ See I.R.C. §§ 401(a)(13), 4975(d)(1) (1988) (explaining these circumstances).

⁴⁰ Pub. L. No. 98-397, 98 Stat. 1426 (1984).

⁴¹ 29 U.S.C. § 1056(d)(3)(A) (1988).

⁴² 29 U.S.C. § 1056(d)(3)(B) (1988). In addition to QDRO protection, REA requires pension plans to provide two separate procedures to protect the employee's spouse from forfeiture of pension benefits upon the employee's death.

First, if the participant survives to retirement age, [REA] requires that his or her annuity be a "qualified joint and survivor annuity" (QJSA), under which payments continue for the lives both of the employee and of the non-employee spouse. Second, if the participant dies before retirement and is vested [REA] makes the nonemployee spouse into a plan beneficiary, whose interest in the plan survives the participant's death. [REA] entitles the surviving spouse to a "qualified preretirement survivor annuity" (QPSA).

Prior to the enactment of REA, the courts were split on whether there was an implied exception to the anti-alienation rule for family support judgments.⁴³ Several courts had difficulty creating such an exception because of the anti-alienation mandate, but also because ERISA preempts "any and all State laws insofar as they may now or hereinafter *relate to*" an ERISA pension plan.⁴⁴ Consequently, in addition to the QDRO provision, REA effected a conforming amendment to ERISA exempting QDROs from ERISA's state law preemption provision.⁴⁵

4. Federal Tax Liens

Federal tax liens can attach ERISA pension plans.⁴⁶ This is because ERISA's preemption clause clearly states that its provi-

LANGBEIN & WOLK, *supra* note 1, at 434. Prior to the enactment of REA, there were provisions for QJSAs and QPSAs. The plan participant, however, and not the nonemployee spouse, possessed the power to elect or forego the QJSA or QPSA. *Id.* at 435, 438. REA's major reform in the survivor annuity area was to transfer the power to decline a spouse's congressionally mandated QJSA or QPSA entitlement from the plan participant to the nonemployee spouse. *Id.* Furthermore, ERISA provides that a plan participant cannot effect a waiver of the QJSA or QPSA entitlement without spousal consent. *Id.* at 435, 438-39. Congress provided very specific rules with respect to how and when a nonemployee spouse may elect to waive these entitlements. For a further discussion of those rules and QPSAs generally as they relate to the state-killer-law exception to ERISA's anti-alienation rule, see *infra* part V.

⁴³ Compare, *American Tel. & Tel. Co. v. Merry*, 592 F.2d 118, 124 (2d Cir. 1979) (creating implied family support exception based on ERISA's policy of protecting both employees and their dependents) with *Francis v. United Technologies Corp.*, 458 F. Supp. 84, 86 (N.D. Cal. 1978) (holding ERISA's preemption and anti-alienation provisions prevent application of state community property law authorizing attachment of pension benefits for family support judgments). For a brief summary of the arguments in favor of the creation of an implied exception to the anti-alienation rule for family support judgments, see *Cartledge v. Miller*, 457 F. Supp. 1146, 1154-58 (S.D.N.Y. 1978) (reasoning that purpose of ERISA was "not to insulate a breadwinner from valid support of spouse and offspring"). See Michael T. Murray, Note, *The Fraud Exception to ERISA's Anti-Alienation Provision: A Permissible Exercise of the Chancellor's Powers?*, 57 *FORDHAM L. REV.* 835, 843-45 (1988); see also *infra* part VI.B. (suggesting that these arguments are no more compelling than those that favor criminal fraud exception proposed herein).

⁴⁴ 29 U.S.C. § 1144(a) (1988) (emphasis added).

⁴⁵ 29 U.S.C. § 1144(b)(7) (Supp. V 1993).

⁴⁶ *E.g., In re Anderson*, 149 B.R. 591, 594 (Bankr. 9th Cir. 1992). In contrast, state garnishments, levies, and civil judgments, which do not fall within any exception to ERISA's anti-alienation and preemption provisions, cannot attach ERISA pension plans. See *Arizona Laborers, Teamsters, & Cement Masons, Local 395 Pension Trust Fund v. Nevarez*, 661 F. Supp. 365, 368 (D. Ariz. 1987) (holding that plaintiff cannot execute writ of garnishment against pension funds); *Cody v. Riecker*, 454 F. Supp. 22, 24 (E.D.N.Y. 1978) (holding that anti-alienation clause and Treasury Regulations confirm that ERISA precludes both voluntary and involuntary alienations),

sions do not "supersede any law of the United States . . . or any rule or regulation issued under any such law."⁴⁷ Thus, section 6321 of the IRC, which under certain circumstances creates a lien "upon all property and rights to property,"⁴⁸ and does not exempt pension benefits,⁴⁹ operates to effectuate federal tax liens on ERISA pension plans. Furthermore, both the Treasury Department and the DOL are empowered to enforce and interpret ERISA,⁵⁰ and while the Treasury's interpretation that federal tax liens are exempt from ERISA's anti-alienation provision is not controlling, it is afforded great weight.⁵¹

aff'd, 594 F.2d 314 (2d Cir. 1979); Treas. Reg. 1.401(a)-13(b)(1) (1994) ("[B]enefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process."). *But see* Retirement Fund Trust v. Franchise Tax Bd., 909 F.2d 1266 (9th Cir. 1990) (holding state withholding tax does not violate ERISA's anti-alienation rule).

The Supreme Court has made it clear that the alienation prohibition dictates that a debtor in bankruptcy may exclude his interest in an ERISA qualified plan from his bankruptcy estate in furtherance of an "important policy underlying ERISA: uniform national treatment of pension benefits." *Patterson v. Shumate*, 112 S. Ct. 2242, 2250 (1992); *see also* BRUCE, *supra* note 1, at 297-98 (noting split among circuits prior to *Patterson*, which adopted minority view). *See generally* Noel C. Ice, *What Are Creditors' Rights in Retirement Plan Benefits?*, 21 EST. PLAN. 30 (Jan.-Feb. 1994) (explaining far reaching effect of *Patterson*).

⁴⁷ 29 U.S.C. § 1144(d) (1988).

⁴⁸ I.R.C. § 6321 (1988).

⁴⁹ *See* I.R.C. § 6334 (1988); *see also id.* at § 6331 (relating to levy and distraint).

⁵⁰ *See* 29 U.S.C. §§ 1201-1242 (1988); *General Motors Corp. v. Buha*, 623 F.2d 455, 461 (6th Cir. 1980) (relying on administrative interpretations of the anti-assignment provision of ERISA). ERISA specifically authorizes the Treasury Department to prescribe the regulations relating to minimum participation, vesting, and funding standards as those standards appear in the sister provisions of ERISA in the Internal Revenue Code. 29 U.S.C. 1202(c) (1988); *see* H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 5038, 5139 (explaining import of 29 U.S.C. § 1202(c)). Pursuant to this authority, the Treasury Department issued regulations reinforcing the anti-alienation rule. *See* Treas. Reg. 1.401(a)-13(b)(1) (1994). Not surprisingly, however, the regulations recognize an exception to the anti-alienation rule for the "enforcement of a federal tax levy" or the "collection by the United States of a judgment resulting from an unpaid tax assessment." Treas. Reg. 1.401(a)-13(b)(2) (1994); *see also* BRUCE, *supra* note 1, at 299 (explaining Treasury Regulation and citing cases); *infra* note 210 (explaining DOL formerly had authority to regulate).

⁵¹ *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

B. *The Regulatory Benefit Overpayment Exception*

Treasury Regulations permit plans to provide "for the recovery . . . of overpayments of benefits previously made to a participant" without violating the anti-alienation rule.⁵²

C. *State Killer Laws*

When a surviving ERISA spouse who is otherwise entitled to a "qualified preretirement survival annuity" ("QPSA")⁵³ is convicted of killing his or her spouse, he or she is precluded from enjoying the deceased spouse's pension benefits notwithstanding ERISA's anti-alienation and preemption provisions.⁵⁴

⁵² Treas. Reg. § 1.401(a)-13(c)(2)(iii) (1994); see also *Larsen v. NMU Pension Plan Trust*, 767 F. Supp. 554, 558 (S.D.N.Y. 1991) ("Adjusting plaintiff's damages to reflect the [overpayment] offset . . . would not run afoul of ERISA's anti-alienation rule To disregard \$5800 in benefits plaintiff would not have received but for [the overpayment] . . . would constitute a windfall to the plaintiff at the expense of other Plan participants.") (citation omitted); Bruce, *supra* note 1, at 299-300 (discussing DOL regulations consistent with Treasury Department position on recoupment of overpayments).

⁵³ See *supra* note 42 (discussing QPSAs).

⁵⁴ See *New Orleans Elec. Pension Fund v. Newman*, 784 F. Supp. 1233, 1236 (E.D. La. 1992); see also Gen. Couns. Mem. 39,000 (June 16, 1983) ("[T]here is an implied exception to . . . [the anti-alienation rule] for purposes of applying the common law principle that a killer should not benefit from his or her own crime."); cf. *New Orleans Elec. Pension Fund v. DeRocha*, 779 F. Supp. 845, 851 (E.D. La. 1991) (holding surviving ERISA spouse convicted of manslaughter of husband not entitled to QPSA benefits, but no anti-alienation argument raised); *Mendez-Bellido v. Board of Trustees*, 709 F. Supp. 329, 334 (E.D.N.Y. 1989) (same).

The *Newman* court stated that "[w]hether a certain state action is preempted by federal law is one of congressional intent . . . and this Court finds that Congress did not intend ERISA to preempt state laws which prohibit murderers from reaping financial benefits as a result of their crimes." *Newman*, 784 F. Supp. at 1236 (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987)). The court discussed an additional basis to deny the defendant benefits even if ERISA did preempt the state killer statutes, despite the anti-alienation rule and her congressionally mandated entitlement to a QPSA. *Id.* The court found the defendant's admission that she was an "unworthy heir" as defined under Louisiana civil law sufficient to constitute a "waiver [that] does not contravene the anti-alienation provision[] of ERISA," *id.*, nor "[t]he ERISA provisions on waiver . . . of a QPSA." *Id.* at 1237.

With respect to the anti-alienation mandate, the court reasoned that the Supreme Court's decision in *Guidry* "is not offended by this Court's decision that the policy considerations that underlie the 'killer statutes' provide an implied exception to the anti-alienation rule." *Id.* at 1237. Regarding finding that Mrs. Newman waived her entitlement to the QPSA, the court reasoned that "Mrs. Newman's voluntary participation in a state court order declaring her unworthy for having killed the plan participant fulfills the legal requirement of a written waiver of the QPSA." *Newman*, 784 F. Supp. at 1238; see *infra* part V (questioning entire line of reasoning in *Newman*, *Mendez-Bellido* and *DeRocha* cases and suggesting they cannot be reconciled with *Guidry*).

D. *The Employee Wrongdoing Exceptions*

1. An Exception for State Criminal Restitution Orders?— Not Exactly

In *New Jersey v. Pulasty*,⁵⁵ the New Jersey Superior Court, Appellate Division, held that ERISA's anti-alienation rule does not protect the pension benefits of an employee-wrongdoer who is ordered to pay restitution to his employer under the authority of a state *criminal* statute.⁵⁶ On appeal, however, the New Jersey Supreme Court modified the lower court's ruling and made it clear that it was not creating an exception to ERISA's anti-alienation clause for New Jersey's criminal restitution statute.⁵⁷ Rather, because Pulasty's pension benefits were being paid to him and were, thus, no longer in the pension plan, the anti-alienation clause was not applicable.⁵⁸ The restitution order, therefore, which did not offend ERISA's preemption clause,⁵⁹ could be satisfied from Pulasty's stream of unprotected pension benefits.⁶⁰

In *Pulasty*, the treasurer of the State Fireman's Association embezzled more than \$600,000 and, pursuant to a plea bargain, was ordered by the trial court to remit approximately \$453,300 to his employer in accordance with the restitution provision of a New Jersey criminal statute.⁶¹ The restitution order stipulated that "the defendant is to assign all rights to his [ERISA qualified] pension" to his former employer.⁶² Pulasty appealed, citing *Guidry* for the proposition that even criminal wrongdoer's pension benefits are unassailable in light of ERISA's anti-alienation provision. The Appellate Division, however, distinguished *Guidry* on the ground that the case involved a civil judgment whereas *Pulasty* involved the involuntary assignment of pension benefits pursuant to a state criminal restitution statute, which is not preempted

It is suggested that the judicial creation of this exception, while just and consistent with the result advocated herein, cannot be reconciled with the Supreme Court's interpretation of ERISA's anti-alienation rule in *Guidry*.

⁵⁵ 612 A.2d 952 (N.J. Super. Ct. App. Div. 1992), *aff'd on other grounds*, 642 A.2d 1392 (N.J.), *cert. denied*, 115 S. Ct. 579 (1994).

⁵⁶ *Id.* at 953.

⁵⁷ *New Jersey v. Pulasty*, 642 A.2d 1392, 1394 (N.J.) (per curiam) *cert. denied*, 115 S. Ct. 579 (1994). ("Our decision today creates no exception to ERISA's non-alienability clause.").

⁵⁸ *Id.*

⁵⁹ *Id.*; *accord* *Brosamer v. Mark*, 561 N.E.2d 767, 769 (Ind. 1990).

⁶⁰ *Pulasty*, 642 A.2d at 1394.

⁶¹ *Pulasty*, 612 A.2d at 953.

⁶² *Id.*

under ERISA.⁶³ The court held that ERISA was "not [meant] to eliminate a legitimate sentencing tool of the state criminal court."⁶⁴

The Appellate Division based its reasoning on the fact that the ERISA preemption clause exempts "any *generally applicable* criminal law of a State."⁶⁵ Notwithstanding the fact that ERISA's provisions "supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan,"⁶⁶ the court asserted that "the restitution provision of . . . [the New Jersey criminal statute] is a *generally applicable* criminal law and does not 'relate to' an employee benefit plan; thus it is not preempted by ERISA."⁶⁷ As was noted earlier, the New Jersey Supreme Court affirmed the Appellate Division's decision but on different grounds. It refused to adopt the Appellate Division's assertion that, when pension benefits still remain in the pension plan and have yet to be paid out, the anti-alienation clause applies to civil judgments like the one in *Guidry* but not to criminal restitution orders.⁶⁸

In light of the Supreme Court's rationale in *Guidry*,⁶⁹ the New Jersey Supreme Court correctly recognized that the United States Supreme Court would probably not agree that the entry of a criminal restitution judgment renders the anti-alienation clause inapplicable to pension benefits that still remain in a pension plan. Although "generally applicable criminal law[s]" are specifically exempted from ERISA's preemption provision, so too was the remedial provision in the federal statute considered in *Guidry*, which the Supreme Court would not let override the anti-alienation provision. It seems the Supreme Court would not allow the remedial provisions of a state criminal law, though of general applicability, to override the anti-alienation protection afforded to pension assets that remain in a pension plan. Such a statute would, like the federal statute considered in *Guidry*, "eviscerate the protections of . . . [the anti-alienation rule]."⁷⁰

⁶³ *Id.* at 957.

⁶⁴ *Id.*

⁶⁵ 29 U.S.C. § 1144(b)(4) (1988) (emphasis added).

⁶⁶ 29 U.S.C. § 1144(a) (1988) (emphasis added).

⁶⁷ *Pulasty*, 612 A.2d at 958 (emphasis added).

⁶⁸ *Pulasty*, 642 A.2d at 1392, 1394 (N.J. 1994) (per curiam).

⁶⁹ See *supra* note 8 (discussing Supreme Court's rationale).

⁷⁰ *Guidry*, 493 U.S. at 375; see also *supra* note 8 (discussing further rationale of Supreme Court).

2. Fiduciaries of the Plan

Both the District of Columbia Circuit and the Third Circuit have held that ERISA's anti-alienation rule does not protect the benefits of an employee-wrongdoer who is a plan fiduciary⁷¹ who

⁷¹ ERISA's definition of who is a plan fiduciary casts a wide net. LANGBEIN & WOLK, *supra* note 1, at 485 ("[t]he definition of a fiduciary is extraordinarily broad"). For a recent Supreme Court decision evidencing just how far this net can be cast, see *John Hancock Life Ins. Co. v. Harris Bank*, 114 S. Ct. 517, 523 (1993) (determining who is a plan fiduciary is "guided a single sentence or member of a sentence, but look[ing] to the provisions of the whole law, and its object and policy") (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (citation omitted)).

A person is a fiduciary with respect to an employee benefit plan "to the extent (i) he exercises *any* discretionary authority or discretionary control respecting management of such plan or exercises *any* authority or control respecting management or disposition of its assets. . . ." 29 U.S.C. § 1002(21)(A) (1988) (emphasis added). Furthermore, ERISA mandates that any fiduciary who breaches duties owed to a pension plan, "shall be *personally liable* to make good to such plan any losses to the plan resulting from each such breach . . . and shall be subject to such other *equitable or remedial relief as the court may deem appropriate* . . ." 29 U.S.C. § 1109(a) (1988) (emphasis added). See LANGBEIN & WOLK, *supra* note 1, at 517-37 (discussing exclusive benefit rule, duty to diversify, and other duties owed). ERISA's legislative history evidences an intent to confer a broad range of equitable powers upon the courts to fashion remedies for fiduciary breach—including recourse to principles of traditional trust law:

Neither existing State nor Federal law has been effective in preventing or correcting many . . . [fiduciary] abuses. Accordingly, the legislation imposes strict fiduciary obligations on those who have discretion or responsibility respecting the management, handling, or disposition of pension . . . plan assets. The objectives of these provisions are *to make applicable the law of trusts*; . . . to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust.

120 CONG. REC. S-15737 (daily ed. Aug. 22, 1974), *reprinted in* 1974 U.S.C.C.A.N. 5177, 5186 (statement of Sen. Harrison A. Williams, Jr.) (emphasis added); *see also* S. REP. NO. 127, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4871 ("The intent of the committee is to provide the full range of legal and equitable remedies available in both state and federal courts. . . .").

Trust law instructs that a breaching trustee should not be allowed to benefit from his own transgressions. *See, e.g.*, RESTATEMENT (SECOND) OF TRUSTS § 205 cmt. i (1957) (breaching trustee is liable for profits that would have accrued in absence of breach). Furthermore, the constructive trust has long been recognized as a method to prevent the unjust enrichment of a trustee who has fraudulently divested a trust. *See, e.g.*, AUSTIN W. SCOTT, THE LAW OF TRUSTS § 495 (1939) ("A constructive trust arises when a person in a fiduciary relation acquires or retains property, in violation of his duty as a fiduciary."); *Askins v. Easterling*, 347 P.2d 126, 131 (Colo. 1959) (stating that grantor's attempt to convey property in violation of plaintiff's one-half interest is sufficient to void deed and create constructive trust in favor of plaintiff); *Unicare, Inc. v. Thurman*, 599 P.2d 925, 927 (Colo. Ct. App. 1979) (declaring that constructive trust is appropriate remedy for breach of fiduciary duty).

breached a fiduciary duty owed to the plan.⁷² The Fifth Circuit, on the other hand, has held that the anti-alienation rule protects the pension benefits of a fiduciary regardless of whether it was proven that the fiduciary breached the ERISA fiduciary duties he owed to the plan.⁷³

The Supreme Court addressed a similar situation in *Guidry*. There exists a distinction, however, that is vital to understanding the inapposite results reached by the *Guidry* Court and those of the Third and D.C. Circuits. In *Guidry*, a union official pled guilty to embezzling more than \$377,000 from his union in violation of section 501(c) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA").⁷⁴ Although the union alleged a breach of fiduciary duty under the LMRDA, there was no showing that Guidry breached a fiduciary duty to the pension plan itself. Thus, there was no violation of ERISA's provisions relating to fiduciary duties.⁷⁵ Therefore, because there was no breach of fiduciary duty to the plan itself, the anti-alienation clause protected Guidry's pension benefits, and the union could not indirectly recoup its losses on behalf of its members⁷⁶ "[a]lthough . . . [Guidry's] actions may have harmed the Union's members who are the beneficiaries of the funds."⁷⁷ The Court specifically left open the question whether a pension plan is able to offset a judgment against a fidu-

⁷² *Crawford v. LaBoucherie Bernard, Ltd.*, 815 F.2d 117, 121 (D.C. Cir.), *cert. denied sub nom. Goldstein v. Crawford*, 484 U.S. 943 (1987); *Coar v. Kazimir*, 990 F.2d 1413, 1414 (3d Cir. 1993); *see Pension Benefit Guar. Corp. v. Solmsen*, 743 F. Supp. 125, 129 (E.D.N.Y. 1990) (evidencing consistent holding at district court level).

⁷³ *Herberger v. Shanbaum*, 897 F.2d 801, 804 (5th Cir.), *cert. denied*, 498 U.S. 817 (1990) (holding anti-alienation clause protects fiduciary's pension benefits *despite breach of fiduciary duty to plan*). The Fifth Circuit specifically declined to follow *Crawford*, quoting dicta from the *Guidry* decision which "undermine[d] the *Crawford* reasoning." *Id.*; *cf. McLaughlin v. Lindemann*, 853 F.2d 1307, 1309 (5th Cir. 1988) (holding anti-alienation rule prevents offset of pension benefits against judgment entered for knowing participation by nonfiduciary third party in breach of fiduciary duty by plan trustee). The *McLaughlin* court noted that since the defendant was a nonfiduciary, "whether the holding in *Crawford* was proper is a matter . . . [that] need not [be] decide[d]." *Id.*

⁷⁴ *Guidry*, 493 U.S. at 367-68; *see* 29 U.S.C. § 501(c). Section 501(c) provides for a fine or imprisonment for officers or employees who steal or embezzle from their union. *Id.*

⁷⁵ *Guidry*, 493 U.S. 375-76; *see supra* note 71 (discussing fiduciary duties).

⁷⁶ *Guidry*, 493 U.S. at 373-74.

⁷⁷ *Id.*

ciary's pension benefits when the judgment is predicated on a breach of the fiduciary duties he owed to the plan.⁷⁸

In contrast, the circuit court cases all addressed the precise question left open by the *Guidry* Court. And although two of the three circuit courts that have considered the issue subscribe to the breaching fiduciary exception to the anti-alienation rule, it is suggested that should the Supreme Court address the issue, it would not agree with that majority.

In an apparent contradiction, the Supreme Court denied certiorari to the D.C. Circuit, which created a breaching fiduciary exception, and also to the Fifth Circuit, which refused to create a breaching fiduciary exception. However, the D.C. Circuit decided *Crawford v. La Baucherie Bernard, Ltd.* three years before *Guidry* while the Fifth Circuit (which refused to create the exception) decided *Herberger v. Shanbaum* just months after the Supreme Court considered *Guidry*. Since the denial of certiorari in *Herberger* occurred just months after it decided *Guidry*, it would seem that the Supreme Court would refuse to permit the breaching fiduciary exception. Consider the following passage from *Guidry*:

As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text. The creation of such exceptions, in our view, would be especially problematic in the context of an antigarnishment provision. Such a provision acts, by definition, to hinder the collection of a lawful debt. *A restriction on garnishment therefore can be defended only on the view that the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties. It makes little sense to adopt such a policy and then to refuse enforcement whenever enforcement appears inequitable . . .* The impracticability of defining such a standard reinforces our conclu-

⁷⁸ See *id.* at 373 ("We need not decide whether the remedial provisions contained in . . . [29 U.S.C. 1109(a)] supersede the bar on alienation . . . since . . . [Guidry] has not been found to have breached any fiduciary duty to the pension plans.") (emphasis omitted). The question that the *Guidry* court faced was not whether ERISA's provision for fiduciary breaches to pension plans superseded the anti-alienation clause, but rather whether the authorization of "other appropriate relief" under § 501(b) of the Labor Management Reporting and Disclosure Act of 1959 overrode the prohibition on alienation. *Guidry*, 493 U.S. at 374-75.

Despite the fact that the Court left open the question as to a breaching fiduciary, the Fifth Circuit in *Herberger* found the *Guidry* dicta persuasive enough to disallow an offset in a case in which a fiduciary breached his fiduciary duty as trustee of a pension plan. See *supra* note 73.

sion that the identification of *any* exception should be left to Congress.⁷⁹

The *Herberger* court considered the Court's dicta sufficiently persuasive to undermine the reasoning of *Crawford*.⁸⁰ The Supreme Court apparently agreed when it denied certiorari.

On the other hand, the *Coar* court rejected *Herberger's* reasoning as "constru[ing] *Guidry's* holding too broadly and plac[ing] insufficient emphasis on the wording of . . . [the fiduciary and anti-alienation rules] and ERISA's legislative history."⁸¹ Instead, the *Coar* court chose to hang its interpretive hat on congressional intent, reasoning that "Congress did not intend to allow an individual such as *Coar* to collect pension benefits prior to satisfying his liabilities to the fund,"⁸² and reading the anti-alienation rule "and, by extension *Guidry*, as shielding only the beneficiaries' interest under the pension plan from third party creditors."⁸³

III. THE NONFIDUCIARY-EMPLOYEE WRONGDOING CASE LAW

With the exceptions to the anti-alienation rule as a background, the purpose of this Note is to propose an amendment to ERISA's anti-alienation provision, and in the alternative, a legal method by which the judiciary might create an exception thereto, such that the "natural distaste" for the result reached in *Guidry* no longer remains.⁸⁴ Toward that end, a review of the nonfiduciary-employee wrongdoing case law is necessary.

The nonfiduciary-employee wrongdoing cases can be generally categorized into three types. In a Type 1 case, the employer is the named ERISA trustee and seeks to withhold more than the amount the employee is convicted of stealing. In a Type 2 case, the employer is the named ERISA trustee and seeks to withhold an amount equal to or less than the amount the employee-wrongdoer is convicted of stealing. In a Type 3 case, the named ERISA trustee is someone other than the employer and either the em-

⁷⁹ *Guidry*, 493 U.S. at 376-77 (emphasis added).

⁸⁰ *Herberger v. Shanbaum*, 897 F.2d 801, 804 (5th Cir.), cert. denied, 498 U.S. 817 (1990).

⁸¹ *Coar v. Kazimir*, 990 F.2d 1413, 1419 (3rd Cir. 1993).

⁸² *Id.* at 1423.

⁸³ *Id.* at 1420-21.

⁸⁴ It appears that absent the congressional intervention called for in this Note to enact a criminal fraud amendment, the Supreme Court will inevitably resolve the split among the circuits in the fiduciary wrongdoing area as it did in *Guidry* in the nonfiduciary employee wrongdoing area: by speculating on congressional intent.

ployer, or a subrogee to a right of the employer, seeks to attach the pension benefits of the defalcating employee, after entry of a criminal conviction. These distinctions are significant because, in the first two scenarios, courts should find that both the nonforfeiture and the anti-alienation provisions impede restitution whereas, in the third, only the anti-alienation rule is applicable because the employer is not the party actually holding the pension benefits and, thus, cannot effect a forfeiture of those funds.

A. *Employee Wrongdoing Cases That Preceded Guidry*

One of the first employee wrongdoing cases was *Helmsley-Spear, Inc. v. Winter*,⁸⁵ wherein an employer accused its employee of engaging in a wide range of fraudulent activities, including falsification of invoices, misappropriation of checks, and the acceptance of kickbacks from the employer's suppliers at an alleged cost to the employer of \$665,549.⁸⁶ Ultimately, the employee was convicted of grand larceny for the theft of two checks totalling \$8584.⁸⁷ The employer, however, sought and obtained the attachment of all \$20,924.94 in the employee's ERISA-qualified profit sharing plan, a Type 1 scenario.⁸⁸ Averring that ERISA's anti-alienation rule precludes involuntary assignments, the state appellate court vacated the trial court's grant of attachment⁸⁹ and, largely employing a nonforfeiture argument, declined to create an exception for employee fraud.⁹⁰ A thorough dissent challenged the majority with the declaration that ERISA's nonforfeiture rules should not be construed "to shield an employee, proven to be a

⁸⁵ 426 N.Y.S.2d 778 (App. Div. 1980), *aff'd*, 52 N.Y.2d 984 (1981).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 781. In upholding its earlier ruling refusing to vacate the order of attachment of the pension benefits, the trial court reasoned that "[i]f a spendthrift trust is available to satisfy a tort claim, it would be *a fortiori* inequitable to allow one who has been convicted of stealing from his employer to invoke such a provision to escape his obligations to make whole the employer who has suffered the depredations." *Helmsley-Spear, Inc. v. Winter*, 420 N.Y.S.2d 599, 601 (Sup. Ct. N.Y. County 1979), *modified*, 426 N.Y.S.2d 778 (App. Div. 1980), *aff'd*, 419 N.E.2d 1078 (N.Y. 1981) (mem.). The modification was, of course, the vacating of the order of attachment. *Helmsley-Spear*, 426 N.Y.S.2d at 781.

⁹⁰ *Id.* In declining to create an exception, the Appellate Division, First Department, noted the "'strong public policy against forfeiture of employee benefits manifested by . . . [ERISA].'" *Id.* (quoting *Post v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 397 N.E.2d 358, 360 (N.Y. 1979)); see *supra* notes 18-20 and accompanying text (distinguishing forfeiture from alienation).

thief, from the reach of remedies designed for the enforcement of judgments."⁹¹ Thus began the debate over whether to create an exception for an employee's criminal fraud.

In *Vink v. SHV North American Holding Corp.*,⁹² another Type 1 case, an employee pleaded guilty to accepting a \$25,000 bribe from his employer's suppliers and was convicted of mail fraud.⁹³ The employer further alleged that Vink had diverted more than three million dollars in business from the employer by setting up dummy corporations with his wife as the sole shareholder.⁹⁴ In compelling the employer to distribute to Vink the pension benefits owed to him, the court relied on a nonforfeiture rationale and deemed the employer's refusal to pay as invoking an implied "bad boy" clause,⁹⁵ which vests in the employer the discretion to decide when an employee's alleged misconduct should result in pension forfeiture. The court advanced four reasons for its refusal to create an implied exception for criminal fraud. First, Congress clearly intended to foreclose the use of "bad boy" clauses.⁹⁶ Second, although recognition of the family support exception to ERISA's nonforfeiture and anti-alienation provisions promotes the well-being of dependents, the creation of a fraud exception would harm the dependents of faithless employees.⁹⁷ Third, the DOL favored an interpretation of ERISA that allows employees to keep pension benefits despite having received illegal bribes.⁹⁸ Fourth, whereas ample precedent existed for creating a

⁹¹ *Helmsley-Spear*, 426 N.Y.S. 2d at 784 (Fein, J.P., dissenting). The dissent argued that the issue was not whether an exception to alienation should be allowed for tort creditors, but rather whether a "faithless employee" may rely on the anti-alienation provision against the employer from whom he has stolen. *Id.* at 782. Judge Fein scathingly added that "[t]he statute was not designed to aid thieves in retaining their loot." *Id.* at 783.

⁹² 549 F. Supp. 268 (S.D.N.Y. 1982).

⁹³ *Id.* at 269. The employee was also convicted of falsely representing his employer's approval as guarantor of a \$95,000 personal loan. *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 270; see *supra* note 30-32 (discussing "bad boy" clauses).

⁹⁶ *Vink*, 549 F. Supp. at 270-71; see *supra* notes 30-32 (discussing "bad boy" clauses).

⁹⁷ *Vink*, 549 F. Supp. at 271. The court went on to mention that carving out a fraud exception could increase "the number of public charges." *Id.*

⁹⁸ *Id.* at 271-72. The *Vink* court's assertion with respect to the DOL's position was based on the Eighth Circuit's decision in *Winer v. Edison Bros. Stores Pension Plan*, 593 F.2d 307 (8th Cir. 1979).

In *Winer*, an employer believed that two former employees received illegal kickbacks from suppliers. *Id.* at 309. On the basis of this discretionary belief, and prior to the entry of any criminal convictions, *id.* at 309 n.2, the employer invoked the provi-

family support exception, none existed for creating a fraud exception.⁹⁹

Although noting that the facts of the case presented a perfect opportunity "to carve out a 'fraud' exception to ERISA's nonforfeitability provisions,"¹⁰⁰ and "that Vink's fraudulent actions will subtract from the amounts that . . . [the employer's] faithful employees will receive under the company's profit-sharing pension plan,"¹⁰¹ the *Vink* court advanced an argument that would become the hallmark for subsequent appellate court refusals to create a criminal fraud exception to ERISA's anti-alienation rule:¹⁰² it would be judicially impracticable to administer.¹⁰³

sions of a "bad boy" clause to effectuate a forfeiture of the employee's pension benefits. *Id.* at 309. The Secretary of Labor filed suit against the plan, alleging breaches of ERISA's vesting requirements, *id.* at 310, and the *Winer* court affirmed the trial court's determination that the employees were entitled to their pension benefits. *Winer*, 593 F.2d at 310.

There is a distinction between *Winer* and *Vink* which the *Vink* court conveniently overlooked. In *Winer*, the employer's decision to withhold the pension benefits was based on its own discretionary finding that the employees had received illegal kickbacks whereas in *Vink* there was a criminal conviction entered in a competent state court as to the employee's receipt of the illegal kickback. With respect to "bad boy" clauses, Congress sought to remedy potential overreaching and the undue influence an employer could exert over an allegedly disloyal employee. See H.R. REP. NO. 807, 93d Cong., 2d Sess. 60 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4726 ("[A] vested benefit is not to be forfeited because the employee later went to work for a competitor, or in some other way was considered 'disloyal' to the employer.") (emphasis added); see also *supra* note 32 (citing further legislative history relating to "bad boy" clauses).

Thus, the *Vink* court's statement that "the Department of Labor sued . . . [in *Winer*] so as to prohibit companies from denying pension benefits to employees dismissed because they received illegal kickbacks from suppliers," *Vink*, 549 F. Supp. at 271-72, was gratuitously broad, misleading, and not necessarily applicable where an employee has been convicted of criminal wrongdoing. See *infra* note 210 (discussing DOL's position). Subsequent appellate courts that refused to create a criminal fraud exception failed to address this crucial distinction and relied on *Vink* notwithstanding the decision's inapplicability in situations in which there has been a criminal adjudication that an employee has looted his employer.

⁹⁹ *Vink*, 549 F. Supp. at 272. In *Vink*, the employer cited one case in support of its position: *National Bank v. International Bhd. of Elec. Workers Local 3*, 419 N.Y.S.2d 127 (App. Div.), *appeal dismissed*, 397 N.E.2d 1333 (N.Y. 1979). *Vink*, 549 F. Supp. at 272. The *Vink* court noted, however, that the case was disapproved by the Appellate Division, First Department, in the *Helmsley-Spear* decision, which was later affirmed by the New York State Court of Appeals. *Id.*; see *Helmsley-Spear, Inc. v. Winter*, 426 N.Y.S.2d 778, 780 (App. Div. 1980), *aff'd*, 419 N.E.2d 1078 (N.Y. 1981).

¹⁰⁰ *Vink*, 549 F. Supp. at 273.

¹⁰¹ *Id.*

¹⁰² See *Ellis Nat'l Bank v. Irving Trust Co.*, 786 F.2d 466, 471-72 (2d Cir. 1986) (citing *Vink's* reasoning as authority not to create "criminal misconduct" exception); *United Metal Products v. Nat'l Bank*, 811 F.2d 297, 299, 300 (6th Cir. 1987) (same). The *United Metal* court also noted an additional factor in deciding not to create the

The first appellate court to recognize an implied exception for criminal fraud was the Eleventh Circuit in *St. Paul Fire & Marine Insurance Co. v. Cox*,¹⁰⁴ a Type 3 case. In *Cox*, the president of an Alabama bank was convicted of willful misapplication of bank funds. The district court permitted the bank's insurer to garnish the president's pension benefits pursuant to a right of subrogation.¹⁰⁵ The Eleventh Circuit noted that some courts interpreted ERISA as overriding "bad boy" clauses (and criminal fraud exceptions by analogy),¹⁰⁶ but nonetheless affirmed the district court's determination by employing the equitable doctrine that a wrongdoer should not benefit from his own crime.¹⁰⁷ The court declared

exception: namely, that such a decision is for the legislature to make, not the judiciary. *Id.* (citing *United States v. Rutherford*, 442 U.S. 544, 559 (1979). *But see United Metal*, 811 F.2d at 301 (Wellford, C.J., dissenting) (refuting *Vink* court's arguments and reasoning); *infra* part VI.B. (same).

¹⁰³ *Vink*, 549 F. Supp. at 273. The *Vink* court reasoned that:

Congress has spoken, and the statute makes clear that the pension benefits of both faithless employees like *Vink* and faithful ones are to be protected, even if it means that the faithful employees will suffer at the expense of the faithless ones.

Carving out an exception in this case would start a boundless stream of suits and disputes in which companies refuse to pay pension benefits to allegedly disloyal employees. Courts would then have to determine whether a fraud exception should apply only to felonies, or whether it should apply to misdemeanors and acts of negligence as well.

Regulation is an imprecise science. Decisions about who and what should be regulated are for Congress to make, so long as such regulations do not offend the Constitution. If SHV would like to create a fraud exception to ERISA's nonforfeiture provisions, it should address its arguments to Congress, not to this court.

Id.

¹⁰⁴ 752 F.2d 550 (11th Cir. 1985) (per curiam).

¹⁰⁵ *Id.* at 551. In contrast to *Vink* and *Helmsley-Spear*, the focus of *Cox* centered on the anti-alienation provision rather than the nonforfeiture rules. *Id.* at 551 n.1. Unlike *Vink* and *Helmsley-Spear*, *Cox* involved a subrogee of an employer that sought to attach the employee's pension benefits. Thus, any surrender of the employee's pension rights is not properly classified as a forfeiture, but rather, as an alienation. Therefore, only the anti-alienation rule is applicable. *Id.* at 552 n.1; *see supra* notes 18-20 (distinguishing forfeiture from alienation).

¹⁰⁶ *Cox*, 752 F.2d at 552 n.2. "Cox's offense was not simply an act of disloyalty [which is the purported justification for "bad boy" forfeitures]; it was a felony perpetrated against his employer. The insulation of an employee from liability for the consequences of his criminal misconduct does not . . . [promote ERISA's goals]." *Id.* at 552 (footnote omitted).

¹⁰⁷ *Id.* The court found that ERISA "provides no indication whatsoever that it . . . [is] intended to protect the employee against the consequences of his own misdeeds." *Id.* at 552. On the contrary, allowing garnishment in this case best promotes the fundamental ERISA aims of "financial stability of the employer and, indirectly, the employer's pension plan." *Id.* The court further concluded that ERISA's preemption pro-

that "Congress did not intend the anti-alienation provision of ERISA to create a windfall for employees who engage in criminal acts at the expense of their employers."¹⁰⁸

Perhaps the most egregious employee-wrongdoer case is *Ellis National Bank v. Irving Trust Co.*,¹⁰⁹ a Type 3 case, wherein the very benefits receiving anti-alienation protection were fraudulently earned pension contributions.¹¹⁰ The *Ellis* court disagreed with the Eleventh Circuit's finding in *Cox* and allowed ERISA's anti-alienation rule to shield fraudulent commissions earned by a stockbroker from the reach of the defrauded employer. Contrary to *Cox*, the *Ellis* court believed that even a narrow criminal fraud exception would undermine rather than promote the stability of pension plans "by creating uncertainty and potentially delayed receipt or non-receipt of promised benefits."¹¹¹

In *Ellis*, Sam Kalil, Jr., an employee of Bache & Company, participated in the employer's retirement plan and had amassed a vested interest of approximately \$170,000.¹¹² In 1984, a Florida bank obtained state court judgments against Kalil totaling \$210,430.46, which he satisfied by revocably assigning to the bank his interest in the plan.¹¹³ The bank, as assignee, sued the trustee of the plan, Irving Trust & Co.,¹¹⁴ for disbursement, but the trustee answered with an interpleader counterclaim against Kalil,

vision does not preclude application of the equitable doctrine that a person should not profit from his own crime, *Cox*, 752 F.2d at 552 n.3, because "most courts have concluded that Congress intended to preempt only those state laws relating directly to employee benefit plans." *Id.*; see, e.g., *American Tel. & Tel. Co. v. Merry*, 592 F.2d 118, 121 (2d Cir. 1979) (indicating that state laws concerning availability of garnishment orders are not preempted); *Stone v. Stone*, 450 F. Supp. 919 (N.D. Cal. 1978) (same), *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981).

¹⁰⁸ *Cox*, 752 F.2d at 551.

¹⁰⁹ 786 F.2d 466 (2d Cir. 1986).

¹¹⁰ *Id.* at 467.

¹¹¹ *Ellis*, 786 F.2d at 471. The court reiterated the "endless stream of litigation" argument raised in *Vink*:

Would the exception be available to only employers or pension plans, or also to third parties allegedly victimized, such as creditors, the government or even other employees? Would the exception withstand a charge that it would favor business tort claimants over creditors? Would it pave the way for exceptions for noncriminal fraud or conversion?

Id.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ It should be emphasized that the pension plan trustee was Irving Trust & Co., and not the employer, Bache & Co. *Id.* at 467. Thus, the *Ellis* case concerned only ERISA's anti-alienation provision and not its nonforfeiture rules. See *Ellis*, 786 F.2d at 470 n.4 (recognizing distinction). Unlike the *Vink* and *Helmsley-Spear* cases, the

the bank, and Bache.¹¹⁵ Kalil demanded that the trustee disburse the proceeds to the bank, and the bank asserted its rights to the funds as assignee; Bache, however, alleged that Kalil had converted the funds of its customers, "which funds were subsequently deposited into the Plan[]."¹¹⁶ Bache further alleged that it had paid more than three million dollars to customers who had sustained losses due to Kalil's actions and that, therefore, it was subrogated to the claims of its customers.¹¹⁷

In early 1985, Kalil pleaded *nolo contendere* to eight counts of grand theft and securities fraud in connection with the defrauding of Bache customers and was sentenced to twenty-six months in prison and ten years probation.¹¹⁸ The bank ultimately prevailed, however, as the district court granted its motion for summary judgment.¹¹⁹

Significantly, unlike in the other employee wrongdoing cases, the very property stolen from the employer in *Ellis*—the fraudulent commissions—was contributed to the pension plan and was protected by ERISA's anti-alienation rule.¹²⁰ What message does the *Ellis* decision send to embezzlers, defalcators, and other criminals? It appears to be this: If you plan to steal from your employer, deposit as much of the funds as possible into your ERISA qualified pension plan, as Sam Kalil did in *Ellis*. This money will be safeguarded if your employer discovers the act, even if you are criminally prosecuted and ordered to return the funds, as Congress has provided protection in ERISA's anti-alienation rule. In addition, and even more shocking, the *Ellis* court has unwittingly proclaimed that even pension contributions derived from stolen funds will receive alienation protection.

By the Sixth Circuit's own admission, "an almost ideal case for the creation of an implied exception to pension anti-alienation laws"¹²¹ was presented in *United Metal Products Corp. v. National Bank*.¹²² Yet the Sixth Circuit declined its own invitation to cre-

Ellis court's refusal to grant the constructive trust remedy was based on ERISA's anti-alienation rule and not its nonforfeiture provisions. *Id.* at 467.

¹¹⁵ *Id.* at 467.

¹¹⁶ *Id.* at 467-68.

¹¹⁷ *Id.* at 468.

¹¹⁸ *Ellis*, 786 F.2d at 467.

¹¹⁹ *Id.* at 468.

¹²⁰ See *id.*, at 468 ("[The employer] had directly deposited all of these [fraudulent commissions] into the Plans for . . . [the employee's] benefit.").

¹²¹ *United Metal Products Corp. v. Nat'l Bank*, 811 F.2d 297, 300 (6th Cir. 1987).

¹²² 811 F.2d 297 (6th Cir. 1987).

ate a criminal fraud exception, adopting instead the reasoning of the *Vink* and *Ellis* courts.¹²³

In *United Metal*, an employee embezzled more than \$440,000 from her employer, which maintained a profit-sharing plan for the benefit of its employees.¹²⁴ The embezzler had no dependents¹²⁵ and subsequently fled the country¹²⁶ leaving behind some \$35,000 in her pension plan account.¹²⁷ Despite the fact that the employer sought "access to . . . [the embezzler's pension benefits] . . . to return them to the [profit-sharing] plan for use by its loyal employees injured by . . . [the embezzler's] wrongdoing[.]"¹²⁸ that the embezzler had no dependents to support, and that the embezzler had fled the country and would likely never return, the Sixth Circuit, over a strong dissent,¹²⁹ refused to impose a constructive trust on the embezzler's benefits.¹³⁰

¹²³ See *id.* at 300 ("We find the reasoning and authority of the Second Circuit [*Ellis*] persuasive."); *id.* at 299 (citing *Vink* approvingly).

¹²⁴ *Id.* at 298.

¹²⁵ *Id.* at 300.

¹²⁶ *United Metal*, 811 F.2d at 298 n.1.

¹²⁷ *Id.* at 298.

¹²⁸ *Id.* at 300.

¹²⁹ See *id.* at 300-01 (Wellford, C.J., dissenting). Chief Judge Wellford offered four reasons why, in his view, a criminal fraud exception should be created. First, insulating the interest of a criminal who has embezzled over \$440,000 from her employer does not protect fellow employees who are participants in the profit-sharing plan or promote security in the workplace—the principal goals of ERISA. *Id.* at 301. In fact, it is "readily infer[able] that the wrongful taking of substantial funds had an adverse effect on the profits of United Metal Products and, consequently on other employees under the plan." *United Metal*, 811 F.2d at 301. Second, legislative concern over "bad boy" clauses "is no basis to attribute to Congress an intent to protect a fraudulent employee, especially one found after court proceedings to have engaged in conduct criminal in nature and inimical, not only to the employer, but to fellow employees whom ERISA is designed to protect." *Id.* Third, the trepidation over the view that a narrow criminal fraud exception "limited to . . . outrageous and undisputed criminal . . . misconduct" would force pension plan trustees to engage in limitless litigation is unfounded. *Id.* Finally, the reasons behind creating a family support exception to ERISA's anti-alienation rule were no more compelling than the reasons for creating a criminal fraud exception. *Id.*; see *infra* notes 258-265 (discussing this contention).

¹³⁰ The *United Metal* court, in addition to adopting the *Ellis* and *Vink* reasoning, offered an additional reason for not creating a criminal fraud exception; namely, if an exception is to be created, it is for Congress to decide. *United Metal*, 811 F.2d at 300. The court explained:

Only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to statutory language be judicially implied We believe Congress could have reasonably concluded that stability and certainty of

B. *The Guidry Decision*¹³¹

Curtis Guidry was a high-ranking union official and trustee of one of the local union pension funds who, by virtue of his position, was eligible to collect pension benefits from three separate union plans.¹³² After an audit, it was determined that approximately one million dollars was missing from the union's coffers. Guidry subsequently pleaded guilty to embezzling over \$377,000 from the union, in violation of fiduciary duties contained in LMRDA.¹³³ Although Guidry served as trustee of one of the union pension funds, there was never any showing of a breach of fiduciary duty under ERISA,¹³⁴ apparently because that pension fund had negotiated a settlement with Guidry.¹³⁵ While incarcerated, Guidry filed a complaint alleging that the pension plans had failed to pay him his rightful pension entitlement.¹³⁶ The union intervened and asserted six claims against Guidry. The union agreed to settle the first five claims for a \$275,000 judgment in its favor. The sixth claim, through which the union sought the imposition of a constructive trust on Guidry's pension benefits, remained in dispute and, therefore, was litigated by the parties.¹³⁷

pension and profit sharing plans, as well as the avoidance of delay or non-receipt of promised benefits, are important and legitimate goals of ERISA.

Id. (citation omitted).

¹³¹ For other pre-*Guidry* employee wrongdoing cases not discussed herein, see *National Bank of N. Am. v. International Bhd. of Elec. Workers Local 3, Pension & Vacation Funds*, 419 N.Y.S.2d 127 (App. Div.), *appeal dismissed*, 397 N.E.2d 1333 (N.Y. 1979); *Kann v. Keystone*, 575 F. Supp. 1084 (W.D. Pa. 1983); *Calhoun v. FDIC*, 653 F. Supp. 1288 (N.D. Tex. 1987).

¹³² *Guidry*, 493 U.S. at 367. Guidry was the chief executive officer of Sheet Metal International Association from 1964 to 1981 and the trustee of Sheet Metal Workers Local 9 from 1977 to 1981. *Id.*

¹³³ *Id.* One of the methods Guidry employed in his embezzlement scheme was stealing checks issued by the pension plans to the union as payment for clerical services. *Id.* at 374 n.14.

¹³⁴ *Id.* at 373. Guidry was convicted of stealing money from the union only, and not directly from the pension plan. *Guidry*, 493 U.S. at 373.

¹³⁵ *Id.* at 368 n.6. The Local No. 9 pension fund for which Guidry served as trustee received \$20,000 of Guidry's accrued benefit from that pension plan only, which was to be paid to the pension fund's insurer. *Id.*

¹³⁶ *Id.* at 368.

¹³⁷ *Id.* The Supreme Court explained:

The District Court, therefore, was confronted with three different views regarding the disbursement of . . . [Guidry's] pension benefits. [Guidry] . . . contended that the benefits should be paid to him. The two [pension] funds argued that the benefits had been forfeited. The Union asserted that the benefits had not been forfeited, but that a constructive trust should be im-

The United States District Court for the District of Colorado did not believe it was bound by prior employee wrongdoing case law and imposed a constructive trust based on Guidry's breaches of several provisions of the LMRDA.¹³⁸ The Tenth Circuit affirmed on different grounds,¹³⁹ relying on ERISA's remedial provisions for trustee breach and principles of trust law.¹⁴⁰

As discussed earlier in this Note,¹⁴¹ the Supreme Court disallowed the imposition of a constructive trust on Guidry's pension benefits. The Court rejected the idea for two reasons. First, the court stated that the court of appeals erred in invoking ERISA's fiduciary breach remedial provisions because a breach of fiduciary duty under the LMRDA is not proof of a breach of fiduciary duty to the pension plans under ERISA.¹⁴² Thus, the question of whether

posed so that the benefits would be paid to the Union rather than to . . . [Guidry].

Guidry, 493 U.S. at 369.

¹³⁸ *Guidry v. Sheet Metal Worker's Nat'l Pension Fund*, 641 F. Supp. 360, 362-63 (D. Colo. 1986), *aff'd*, 856 F.2d 1457 (10th Cir. 1988), *rev'd*, 493 U.S. 365 (1990). The court first rejected the defendant's forfeiture argument, explaining that even in cases in which misconduct has occurred, ERISA's anti-forfeiture provision requires payment of vested benefits as a matter of law. *Id.* at 361-62. The court next considered whether a constructive trust in favor of the union would be contrary to congressional intent. *Id.* at 362-63. The district court did not deem either *Ellis* or *Cox* as controlling because neither case involved a breach of fiduciary duty under the LMRDA, and both cases were therefore distinguishable. *Id.* at 362. Instead, by reading ERISA *in pari materia* with the LMRDA, the district court found that, in light of the evils these statutes were created to cure, the breach of fiduciary duty under the LMRDA was sufficient to merit a narrow exception to ERISA's anti-alienation provision. *Id.* The court, therefore, imposed a constructive trust on Guidry's pension benefits until the judgment was satisfied. *Guidry*, 641 F. Supp. at 363.

¹³⁹ *Guidry v. Sheet Metal Workers' Nat'l Pension Fund*, 856 F.2d 1457 (10th Cir. 1988), *rev'd*, 493 U.S. 365 (1990).

¹⁴⁰ *Id.* at 1460-61; *see also supra* note 71 (discussing ERISA's remedial provisions for trustee breaches of fiduciary duties and trust law principles).

¹⁴¹ *See supra* notes 12-15 and accompanying text; *supra* note 78 (discussing *Guidry's* relation to wrongdoing fiduciaries).

¹⁴² *Guidry*, 493 U.S. at 373-74. The Supreme Court placed much emphasis on the fact that the union and not the pension plan itself was apparently stuck with the losses caused by Guidry's embezzlement. *Id.* at 373, 374 n.14. "It is clear, however, that . . . [Guidry] was convicted of stealing money only from the Union," *id.* at 373, and the Union "cannot avoid the fact that the [pension] funds here and the Union are distinct legal entities." *Id.* The Court did recognize, however, that Guidry's "actions may have harmed the Union's members who are the beneficiaries of the [pension] funds." *Id.* at 373-74.

Because the Union also perceived the potential problem created by the lack of a breach to the pension plans themselves, it, like the district court, relied principally on LMRDA's remedial provisions in its argument before the Supreme Court. *Guidry*, 493 U.S. at 374. The Union asserted that the LMRDA's remedial provisions allow the imposition of a constructive trust and because it is a federal statute, ERISA cannot

a breach of ERISA fiduciary duties can result in an exception to the anti-alienation rule for attempts to attach a faithless fiduciary's pension benefits remains unanswered.¹⁴³ Second, the Court held that, except perhaps for trustee faithlessness, which the Supreme Court did not consider in *Guidry*, there should be no "generalized equitable exception—either for employee malfeasance or for criminal misconduct—to ERISA's" anti-alienation rule.¹⁴⁴

C. *Guidry's Progeny*

Although *Guidry's* bar on equitable exceptions to ERISA's anti-alienation rule has had a pronounced effect outside the area of employee wrongdoing,¹⁴⁵ only three employee wrongdoing cases

"be construed to alter, amend, modify, invalidate, impair or supersede" it. *Id.* at 375 (quoting 29 U.S.C. § 1144(d)). The Supreme Court quickly foreclosed the use of this federal law supremacy argument: "Were we to accept . . . [the Union's] position, ERISA's anti-alienation provision would be inapplicable whenever a judgment creditor relied on the remedial provisions of a federal statute . . . [W]e decline to adopt so broad a reading of . . . [29 U.S.C. § 1144(d)]." *Id.* at 375. The Court did not believe that Congress intended that the general authorization of the imposition of a constructive trust by the LMRDA to override the specific prohibition in ERISA on assignment or alienation. *Id.* Instead, the court reconciled the two statutes "by holding that the LMRDA determines what sort of judgment the aggrieved party may obtain, while ERISA governs the narrow question whether that judgment may be collected through a particular means." *Id.* at 376 (emphasis in original); see also *supra* note 8 (discussing this aspect of Supreme Court's decision).

¹⁴³ See *Guidry*, 493 U.S. at 373 ("We need not decide whether the remedial provisions contained in . . . [29 U.S.C. § 1109(a)] supersede the bar on alienation in . . . [29 U.S.C. § 1056(d)(1)]."); see also *supra* part II.D.2. (discussing this open question).

¹⁴⁴ *Guidry*, 493 U.S. at 376. The Court viewed § 206 (d) of ERISA (the anti-alienation provision) as a "considered congressional policy choice" to safeguard pension plan participants and their defendants, and indicated that if an exception is to be created it should be done by Congress. *Id.*

¹⁴⁵ See, e.g., *Mills v. Mills*, 790 F. Supp. 172 (S.D. Ohio 1992). In *Mills*, the daughter of an ERISA pension plan participant was awarded a \$2,000,000 state court judgment against her father for years of "appalling . . . physical and sexual abuse." *Id.* at 177. Aware of the Supreme Court's pronouncement that there are no equitable exceptions to ERISA's anti-alienation rule, the plaintiff attempted to argue that the judgment was a "qualified domestic relations order" (QDRO) which can attach an ERISA pension plan because, pursuant to REA, a QDRO is not preempted by ERISA and is an exception to the anti-alienation rule. *Id.* at 174; see *supra* note 42 and accompanying text (explaining QDROs). This argument failed because the judgment clearly did not fall within the definition of a QDRO, and the court granted summary judgment against the daughter. *Mills*, 790 F. Supp. at 176-77. In recognition of its inability to create an equitable exception because of *Guidry*, the court acknowledged the "natural distaste" for "ERISA's harsh effect in this matter." *Id.*

It is worthwhile to note the tragic irony in this decision. The *Guidry* Court declared that the protection of pension benefits via ERISA's anti-alienation rule is sup-

have arisen since *Guidry*.¹⁴⁶ Thus, it would seem the decision has

posed to be for the participant *and his dependents*. *Guidry*, 493 U.S. at 376. Here, the anti-alienation provision has the opposite effect and precludes such a dependent from that protection. *Mills*, 790 F. Supp. at 177-78.

Furthermore, *Mills* illustrates a broader principle underlying the inequity in the employee wrongdoing cases. One of the reasons proffered against creating a wrongdoer exception is that the wrongdoer may have blameless dependents to support. *Guidry*, 490 U.S. at 376. Yet, is it more likely that a wrongdoer will use her pension benefits to support her blameless dependents? Or is it more likely that her propensity for dishonesty will defeat the moral obligation to those dependents? The *Mills* court apparently recognized this contradiction. Editing a quote from *Guidry*, the *Mills* court explained that the anti-alienation rule "reflects a considered congressional policy choice . . . to safeguard a stream of income for pensioners . . . even if that decision prevents others from securing relief for the wrongs done them." *Mills*, 790 F. Supp. at 175 (quoting *Guidry*, 493 U.S. at 376). With the second ellipsis the court deleted the phrase "and their dependents, who may be, and perhaps usually are, blameless." *Guidry*, 493 U.S. at 376. Could there be a more blameless candidate for dependency protection under ERISA's anti-alienation rule than a daughter who has suffered years of physical and sexual abuse at the hands of her ERISA-participant father?

¹⁴⁶ *In re Bell & Beckwith*, 5 F.3d 150 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1060 (1994); *United States v. Gaudet*, 966 F.2d 959 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1294 (1993); *Pomeranke v. Williamson*, 478 N.W.2d 800 (Minn. Ct. App. 1991).

In *Pomeranke*, Williamson pled guilty to embezzlement of bank trust funds for which he received a 41 month prison sentence and was ordered to pay restitution of \$280,000 to one of the defrauded trust beneficiaries. *Pomeranke*, 478 N.W.2d at 801. While incarcerated, Williamson requested a \$14,000 distribution from his \$56,000 ERISA-qualified profit-sharing plan, which he had not included in a list of non-exempt assets required by the restitution order. *Id.* The district court granted the defrauded beneficiary's motion for an order directing the release of the \$14,000 and eventually the balance of the profit-sharing account for distribution to the defrauded beneficiary as payment of the restitution order. *Id.* "In light of the unequivocal directive in *Guidry*," *id.* at 802, the Minnesota Court of Appeals reversed the district court and ordered that the funds be distributed to Williamson, the plan beneficiary. *Id.*

Two things should be noted regarding the *Pomeranke* case. First, it was decided prior to the Supreme Court's decision in *Patterson v. Shumate*, 509 U.S. 753 (1992), which held that under the anti-alienation rule a debtor in bankruptcy may exclude his interest in an ERISA-qualified pension from his bankruptcy estate. *See supra* note 46 and accompanying text. Williamson had not filed bankruptcy. Yet, had this case arisen after *Patterson*, all Williamson would had to have done to shield his ERISA benefits from the defrauded beneficiary is to so file. Second, *Pomeranke* is not a true employee wrongdoing case because the estates whose funds had been embezzled, and not the employer bank, obtained the restitution order. The reason why the beneficiary did not seek compensation from Williamson's employer, and then have Williamson's employer seek reimbursement from Williamson, is unknown.

In *Gaudet*, the facts bear a striking resemblance to those of *Guidry*. Stanley Gaudet served as president of a local sheet metal workers' union and as trustee of several of its ERISA qualified pension funds. *Gaudet*, 966 F.2d at 961. He pled guilty to 22 counts of embezzlement totaling \$2,710,538.87 from the pension plan and \$40,000 from the union, in violation of only the LMRDA. *Id.* As in *Guidry*, there was apparently no showing that Gaudet breached any fiduciary duties owed to the pension plans themselves. The district court, disregarding the Supreme Court's unequivocal directive in *Guidry*, "ordered Gaudet to relinquish the pension funds to which he . . .

deterred employers, who might otherwise have sought redress for an employee's criminal wrongdoing, from attacking plan benefits vested under ERISA. The Supreme Court, however, may not be finished with the Curtis Guidry saga as "[t]he parties to this bitter and interminable litigation have locked horns yet again."¹⁴⁷

In November 1993, after Guidry's retirement benefits had been paid out of the pension plan,¹⁴⁸ the Tenth Circuit held that

[was] personally entitled." *Id.* Naturally, Gaudet argued that *Guidry* required a reversal of the district court's decision. *Id.* at 963. The Fifth Circuit ruled that because Gaudet failed to object to the inclusion of his ERISA benefits in the district court's Presentence Report, which listed assets available for restitution, it was restricted to reviewing his *Guidry* argument only for plain error. *Id.* The Fifth Circuit concluded that the district court's oversight of the *Guidry* mandate is "not an obvious one." *Gaudet*, 966 F.2d at 963. The Fifth Circuit explained that "[n]o judge or other legal scholar can be expected to have an intimate knowledge of every obscure rule of law." *Id.* at 964. The judge, therefore, was not expected to have knowledge of a landmark Supreme Court decision in the area of ERISA benefits law decided just 18 months earlier. While it is obvious that the Fifth Circuit yielded to its judicial instinct to do equity among the parties, it is suggested that its decision, that the district court's oversight of *Guidry* was not plain error, is manifestly ridiculous. It is, however, indicative of the judicial integrity that is compromised when the terms of a statute such as ERISA are construed to compel so unreasonable a result as allowing an embezzler to keep stolen property while his victim goes uncompensated.

In *Bell & Beckwith*, the managing general partner of a stock brokerage limited partnership had embezzled approximately \$47,000,000. *Bell & Beckwith*, 5 F.3d at 151. The limited partnership maintained a profit-sharing plan, to which contributions could be made only from the partnership's net income. *Id.* at 151, 153. The partnership's trustee in bankruptcy obtained deficiency judgments against the embezzler and a writ of execution against his individual interest in the profit-sharing plan. *Id.* at 152. The bankruptcy court held that the anti-alienation rule shields the embezzler's pension benefits. *Id.* at 152. The district court reversed, holding that the trustee should be given a chance to prove his argument that some of the contributions violated the plan's "net income rule" and were therefore *void ab initio*. *Id.* at 151-52. The Sixth Circuit affirmed, distinguishing *Guidry* and *Patterson*:

In neither *Guidry* nor *Patterson* was the propriety of pension contributions at issue. Here . . . the district court, rather than carving out an equitable exception to ERISA, simply said that any contributions made on behalf of . . . [the embezzler] in violation of the net income requirement of the plan would be *void ab initio*. Since void, they never became a part of the plan, and so were not being alienated within the contemplation of the ERISA prohibition [T]herefore . . . the policy concerns of *Guidry* and *Patterson* are not implicated

Bell & Beckwith, 5 F.3d at 153.

It seems a *void ab initio* argument could have been successfully made in the *Ellis* case, see *supra* part III.A., wherein fraudulently earned commissions received anti-alienation protection. Such an argument, however, was not presented in that case.

¹⁴⁷ *Guidry v. Sheet Metal Workers Int'l Ass'n, Local No. 9*, 10 F.3d 700 (10th Cir. 1993), modified, 39 F.3d 1078 (10th Cir. 1994) (en banc); see *supra* note 143.

¹⁴⁸ See *supra* note 142. After the pension funds began making monthly payments into a bank account established by Guidry for that purpose, Local 9 sought to collect

the anti-alienation rule no longer protected those benefits, and that they could be garnished by the union.¹⁴⁹ The court noted that "it is impossible to glean from the statute whether Congress intended the anti-alienation provision to protect benefits paid and received"¹⁵⁰ as does, for instance, the Social Security Act.¹⁵¹ The

its unpaid judgment against Guidry. *Guidry - Local No. 9*, 10 F.3d at 704. Under an agreement, an agent of the pension funds would make out a deposit slip for payment of Guidry's monthly pension, and then the union would seek to garnish the funds as soon as they arrived in that account. *Id.*

¹⁴⁹ *Id.* at 716. In contrast, the district court held that the prohibition against garnishment applies to pension proceeds paid and received "so long as the proceeds are clearly identified as such and have not been commingled with other funds or used for the acquisition of assets." *Id.* at 704. The district court's conclusion was based on the "law of the case" doctrine which requires each court to follow the directions of courts that are higher in the judicial hierarchy—in this instance, the Supreme Court in *Guidry*. *Id.* at 704; see generally 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 4478 (1993 & Supp. 1994) (discussing "law of the case" doctrine).

On appeal to the Tenth Circuit, Guidry relied not only on the "law of the case" doctrine, but also argued that ERISA's anti-alienation rule precludes garnishment of benefits paid and received. *Guidry*, 10 F.2d at 705. The Tenth Circuit rejected both of Guidry's arguments notwithstanding the *Guidry* Court's pronouncement that ERISA's anti-alienation provision "reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners. . . ." *Guidry*, 493 U.S. at 376 (emphasis added). After dismissing the "law of the case" argument, *Guidry*, 10 F.3d at 705-08, the Tenth Circuit determined that the text of the anti-alienation rule was unclear on the issue and, therefore, could not be controlling. *Id.* at 708.

¹⁵⁰ *Id.* at 708. The Tenth Circuit concluded that the anti-alienation rule does not apply to benefits paid and received. *Id.* at 710. Rather, the Tenth Circuit intimated that, since the statute is unclear on whether Congress intended ERISA to apply to benefits paid and received on only monies being currently held in a pension plan, it had to defer to applicable ERISA regulations which indicate that the anti-alienation provision protects benefits while they remain in the plan, but not after they are paid out. *Id.* at 716.

The Tenth Circuit's conclusion turned on certain Treasury Regulations and an interpretation of the term "benefits" in the anti-alienation provision. Recall that the anti-alienation rule requires that "[e]ach pension plan . . . provide that *benefits provided under the plan* . . . not be assigned or alienated." 29 U.S.C. § 1056(d)(1) (footnote 5 is full cite) (emphasis added). The issue, therefore, was whether "benefits provided under the plan" means:

[T]he right to future payment or the actual money paid by the plan and received by the beneficiary. If . . . [it] means the right to future payments, then the garnishment of money paid out to Mr. Guidry would . . . be [proper]. If, however, . . . [it] means the actual money paid to Mr. Guidry, then . . . [garnishment would not be proper].

Guidry - Local No. 9, 10 F.3d at 708.

The court concluded that the statute was unclear and looked to the Treasury Regulations for guidance. *Id.* at 708-10. The regulations define "assignment" and "alienation" as "any . . . arrangement . . . whereby a party acquires from a participant or beneficiary a right or interest *enforceable against the plan*. . ." Treas. Reg. § 1.401(a)-13(c)(1)(ii) (1994) (emphasis added). Because the Union's garnishment of Guidry's already paid and received pension benefits was an action against a bank account and

court also stated its awareness that "garnishment in the present context may thwart Congress' intent."¹⁵²

On a rehearing en banc, the Tenth Circuit reaffirmed its holding that pension benefits paid and received are no longer entitled to anti-alienation protection.¹⁵³ The court, however, added a new impediment to the union's restitution battle with Guidry. Notwithstanding the fact that ERISA's anti-alienation rule no longer protected Guidry's paid and received pension benefits, the defrauded union still could not recover those benefits. The Tenth Circuit held that a state antigarnishment law, which ERISA no longer preempts once the benefits have been paid out,¹⁵⁴ exempts the paid and received pension benefits from the reach of the union's judgment.¹⁵⁵

After the Tenth Circuit's decision, ironically, the fact that benefits have been paid and received serves as both a boon and a bane to defrauded employers. Although the disbursement of benefits jettisons the impediment to recovery created by ERISA's anti-alienation rule, it simultaneously creates a new barrier because

not the pension plan, it was not prohibited by the anti-alienation rule. *Guidry - Local No. 9*, 10 F.3d at 709-10. The court concluded that the Treasury Regulation is not unreasonable, *id.* at 710-11, and that its decision to permit attachment of Guidry's benefits is consistent with the objectives of ERISA and Congress' approach to similar problems in other state statutes. *Id.* at 711-13. The Tenth Circuit rejected Guidry's claim that, under Colorado law and the Federal Consumer Credit Protection Act, garnishment of his benefits was prohibited. *Id.* at 713-15. However, upon a rehearing en banc the court concluded that ERISA did not preempt the state law, and that the funds were protected by Colorado's exemption from garnishment. *Guidry v. Sheet Metal Worker's Nat'l Pension Fund-Local No. 9*, 39 F.3d 1078, 1083-89 (10th Cir. 1994) (en banc).

¹⁵¹ See Social Security Act, 42 U.S.C. § 407(a) (1988) (protecting "any future [social security] payment"); see also Veteran's Benefit Act § 3101, 38 U.S.C. § 5301(a) (1988 & Supp. V 1993) (stating benefits not garnishable "either before or after receipt by . . . beneficiary."); Railroad Retirement Act § 231, 45 U.S.C. § 231m(a) (1988) (stating no annuity is garnishable "under any circumstances whatsoever, nor shall the payment thereof be anticipated."). The Tenth Circuit averred that "[b]ecause Congress did not include similar explicit language protecting benefits in the related context in ERISA, we infer Congress made a deliberate decision [that] retirement income paid and received was not thereafter protected from garnishment." *Guidry - Local No. 9*, 10 F.3d at 712.

¹⁵² *Id.* at 716.

¹⁵³ *Guidry - Local No. 9*, 39 F.3d at 1080.

¹⁵⁴ *Id.* at 1086. "The Colorado [law] providing an exemption to garnishment is therefore not preempted by ERISA." *Id.*

¹⁵⁵ *Id.* Benefits paid and received, as opposed to existing plan benefits, are not preempted by ERISA because the Colorado anti-garnishment provision only tangentially "relates to" ERISA pension plans. *Id.* at 1083-85; see *supra* note 8 (discussing preemption).

disbursed benefits are no longer entitled to ERISA's state law preemption protection. As a result, state antigarnishment provisions operate where previously they could not, thereby effectively supplanting the federally imposed anti-alienation mandate and permitting an embezzler to keep his pension benefits, while leaving that felon's employer to suffer the burden of his crime. Several dissenting circuit judges refused to take part in the perpetuation of this irony. They declared:

The majority has concluded a faithless servant, an embezzler, a man who steals from the hard earned labors of the workers, is entitled to keep the fruits of his crime. I do not believe the Colorado legislature or the Colorado courts would permit such an unconscionable result. It is nonsensical to assume Colorado would want a thief to keep ill-gotten gains. Like Mr. Bumble of *Oliver Twist*, [we] believe that "[i]f the law supposes that, . . . the law is a ass—a idiot," and [we are] not willing to believe Colorado law to be either.¹⁵⁶

D. *An Employee Wrongdoing Panorama*

It is worthwhile to consolidate the import of the employee wrongdoing case law and consider the following simplified hypothetical.

Suppose an employer sponsors an ERISA-qualified profit-sharing plan¹⁵⁷ for the benefit of his employees and contributes ten percent of the business net income per year to the plan.¹⁵⁸ In a given year, the employer has net income of \$10,000,000; there-

¹⁵⁶ *Guidry - Local No. 9*, 39 F.3d at 1089 (Brorby, C.J., Anderson, J., and Tacha, J., dissenting) (citing CHARLES DICKENS, *OLIVER TWIST* 520 (Dodd, Mead & Co. 1941) (1838)). The dissent began its opinion with the following excerpt:

The rain it raineth on the just
And also on the unjust fella:
But chiefly on the just, because
The unjust steals the just's umbrella.

Id. at 1087 (citing CHARLES BOWEN, ET AL., *SAM ERVIN'S BEST SHORT STORIES* (1973)).

¹⁵⁷ For an explanation of the mechanics of a profit-sharing plan, see Treas. Reg. § 1.401-1(b)(1)(ii) (1994). Of course, as its name suggests, a profit-sharing plan is one in which funding is derived directly from an employer's net profits. See generally LANGBEIN & WOLK, *supra* note 1, at 45 (discussing profit-sharing plans); 1 JEFFREY D. MAMORSKY, *EMPLOYEE BENEFITS LAW - ERISA AND BEYOND* §§ 2.01-2.08 (1980) (same).

¹⁵⁸ The maximum permissible deduction for an employer's contributions to a profit-sharing plan is 15% of the total compensation paid to all plan participants. See I.R.C. § 404(a)(3) (1994). While an employer's decision as to how much to contribute to the plan is undoubtedly pegged to its permissible deduction, for purposes of simplicity the hypothetical assumes 10% of net income is the employer's general practice.

fore, his contribution for that year would be \$1,000,000. From previous years' contributions, there is already an existing \$4,000,000 balance in the plan. Thus, this year's contribution would bring the total to \$5,000,000.

Suppose an employee who is also a plan fiduciary steals \$500,000 directly from the pension plan. In the same year, an employee who is not a plan fiduciary steals \$5,000,000, not from the pension plan, but from the employer. Both employees are convicted of embezzlement in a state court of competent jurisdiction, both have spent or otherwise hidden the stolen money, and both have no other assets except their respective interests in the employer's profit sharing plan. The nonfiduciary employee-embezzler who stole \$5,000,000 from the employer, thereby reducing the employer's contribution for the year to \$500,000,¹⁵⁹ does as much damage to his fellow employee-beneficiaries as the fiduciary who directly steals \$500,000 from the plan itself. Yet there is relief in the form of attaching the employee's plan benefits only in the situation in which a fiduciary of the plan was the thief,¹⁶⁰ although relief of this nature is uncertain in the Fifth Circuit.¹⁶¹ Under existing law, the non-fiduciary embezzler can steal that money, indirectly causing the employer to contribute \$500,000 less to the plan that year on behalf of its beneficiaries, squander it, elect to deposit part of the stolen funds in his pension plan,¹⁶² and keep those benefits, in addition to his social security and veteran's benefits,¹⁶³ by either filing bankruptcy¹⁶⁴ or suing the plan trustee,

¹⁵⁹ Because the employer's net income was \$10,000,000, it was reduced to \$5,000,000 by the theft. This amount multiplied by ten percent, the amount of the yearly contribution, results in a \$500,000 contribution.

¹⁶⁰ See *supra* part II.D.2. (discussing attachment of breaching fiduciary's pension benefits permitted in *Crawford v. La Boucherie Bernard, Ltd.*, 815 F.2d 117 (D.C. Cir.), *cert. denied sub nom.*, *Goldstein v. Crawford*, 484 U.S. 943 (1987)).

¹⁶¹ See *supra* part II.D.2. (discussing way *Herberger v. Shanbaum*, 897 F.2d 801 (5th Cir.), *cert. denied*, 498 U.S. 817 (1990), disallowed attachment of breaching fiduciary's pension benefits).

¹⁶² See *supra* part III.A. (discussing how *Ellis* allowed anti-alienation rule to protect fraudulently earned pension contributions).

¹⁶³ See *supra* note 151 (explaining that social security and veteran's benefits are protected after receipt by participant).

¹⁶⁴ See *supra* note 46 (explaining that debtor in bankruptcy may exclude pension benefits from bankruptcy estate). But see 11 U.S.C. § 523(a)(4) (1994). The wrongdoer's prayer for bankruptcy relief would not go uncontested because section 523(a)(4) allows the bankruptcy court to deny a discharge from any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." *Id.*

possibly with the DOL as amicus.¹⁶⁵ The embezzler can do all this despite having no dependents¹⁶⁶ or having to flee the country without a likely return.¹⁶⁷ But then, after the money is paid out and presumably used by the embezzler and his dependents for retirement purposes, which is the rationale for protecting the benefits in the first place, the employer, who has perhaps gone through the expense of three lawsuits and three appeals,¹⁶⁸ can begin to garnish the malefactor's benefits free of ERISA's anti-alienation obstacle a mere decade from the time it discovered that the funds were converted.¹⁶⁹ However, should the employer be located in a state that has its own antigarnishment statute, freedom from ERISA's anti-alienation rule will be of no moment, and the employee-felon's stream of pension income will be protected so that he might further benefit from his own crime.¹⁷⁰

Of course, such a chaotic scheme should not be attributed to congressional design. Nevertheless, this hypothetical is illustrative of the present state of the law, which ironically developed under a judiciary concerned about defeating congressional intent. Such chaos should be rectified by legislative action.

IV. A CRIMINAL FRAUD AMENDMENT¹⁷¹

A. Policy Concerns

The following proposed amendment furthers stated ERISA goals and is offered under the assumption that Congress did not

¹⁶⁵ See *supra* note 98 and accompanying text (noting DOL advocated ERISA interpretation that allowed employee convicted of taking bribes to retain pension benefits).

¹⁶⁶ See *supra* part III.A. (noting embezzler had no dependents).

¹⁶⁷ See *id.* (noting embezzler fled country and would not likely return).

¹⁶⁸ See *supra* part III.B (discussing *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990)).

¹⁶⁹ See *supra* part III.C. (discussing *Guidry v. Sheet Metal Workers Int'l Ass'n, Local No. 9*, 10 F.3d 700, 716 (10th Cir. 1993), *modified*, 39 F.3d 1078 (10th Cir.) (en banc)). *Guidry's* embezzlement was first discovered in 1981, *Guidry*, 493 U.S. at 367, but it was not until 1993 that the union obtained relief. *Guidry - Local No. 9*, 10 F.3d at 716.

¹⁷⁰ See *supra* part III.C. (discussing *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 39 F.3d 1078 (10th Cir. 1994) (en banc) and noting paid and received benefits no longer eligible for preemption protection and therefore state antigarnishment statute protects embezzler's pension disbursements).

¹⁷¹ For fraud amendments similar to the one proposed herein, see Comment, *ERISA-Exceptions*, *supra* note 17, at 352-57; Note, *Employee Theft and ERISA*, *supra* note 17, at 338-40. Furthermore Congressman Bill Green (R. N.Y.), primarily in response to the *Ellis* case, *supra* part II.A., proposed a bill amending the anti-

intend to allow an employee who has criminally defrauded his employer to benefit from his crime. From a policy standpoint, it seems reasonable that a participant's benefits should generally be shielded from creditors,¹⁷² even those harmed by the participant's negligence.¹⁷³ Promoting a secure retirement nest egg in order to prevent an increase in the number of public charges is indeed socially desirable and necessary to the country's overall economic viability.¹⁷⁴

alienation rule (together with necessary conforming amendments to the IRC and ERISA's preemption provisions). H.R. 2317, 100th Cong., 1st Sess. (1987). The amendment proposed herein draws from all three of these sources.

¹⁷² Such a policy is consistent with principles of spendthrift trust law. See SCOTT, *supra* note 7, §§ 151-52.

In many of the cases in which it has been held that by the terms of the [spendthrift] trust the interest of a beneficiary may be put beyond the reach of his creditors, the courts have laid some stress on the fact that the creditors had only themselves to blame for extending credit to a person whose interest under the trust had been put beyond their reach . . . [B]efore extending credit they could have ascertained the extent and character of the debtor's resources.

Id. § 157.5; cf. WILLIAM L. CARY & MELVIN A. EISENBERG, CORPORATIONS 173-75 (6th ed. 1988) (discussing voluntary creditor doctrine as reason to deny "veil piercing" in corporate law context).

¹⁷³ Negligence, even gross, does not amount to a crime; thus, the doctrine that a wrongdoer should not profit from his crime does not operate. Furthermore, an elaborate system of insurance exists to compensate victims for injury due to the negligent conduct of others. An interesting dilemma arises when criminal negligence and recklessness are the reasons for attaching pension benefits. One example is when a drunk driver kills someone and the estate remains without compensation because the assailant has no assets other than pension assets to satisfy an excess judgment. See LANGBEIN & WOLK, *supra* note 1, at 458 ("What would be the basis for waiving ERISA's antialienation rule for employer plaintiffs (who often have deep pockets) but not for the poor wretch whom the wrongdoer mowed down in a drunken stupor?"). Some commentators consider this another persuasive reason to create an exception to the anti-alienation rule. While surely it is, unlike in the employee wrongdoing area, in which the ERISA goals of security in the workplace and protection of plan assets are comprised, see *infra* notes 249-50 and accompanying text, an exception for criminal negligence in the reckless driving scenario is not consistent with ERISA's prime directive of providing for the retirement needs of those who have engaged in a lifetime of useful and socially productive work. See *id.* Nevertheless, an exception for criminal negligence and recklessness presents a persuasive argument.

¹⁷⁴ See 29 U.S.C. § 1001(a) (1988). This section points out:

[T]he operational scope and economic impact of such [employee benefit] plans is increasingly interstate; . . . the continued well-being and security of millions of employees and their dependents are directly affected by the plans; . . . they are affected with a national public interest; . . . they have become an important factor affecting the stability of employment and the successful development of industrial relations; [and] . . . they have become an important factor in commerce because of the interstate character of their activities . . .

However, to shield pension benefits from an employer who seeks restitution for willful and often malicious criminal acts¹⁷⁵ that reduce, either directly or indirectly, the benefits of other law abiding pensioners or, at the very least, impair the ability of an employer to make contributions, is contrary not only to notions of fairness and equity but to the policies of ERISA itself.¹⁷⁶

In recognition of these thwarted policies, the following amendment requires that the plan itself or the employer, or both, and therefore the employer's ability to contribute to the plan,¹⁷⁷ must have been damaged.

B. The Amendment

1. The Anti-Alienation Rule

Section 1056(d)(1) of the ERISA should be amended to include the following language (indicated by italics):¹⁷⁸

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated *and may not be subject to attachment, garnishment, levy, execution, or other legal or equitable process, either before or after receipt by a beneficiary of such plan.*

The language, "and may not be subject to attachment, garnishment, levy, execution or other legal or equitable process," merely codifies the language contained in relevant Treasury Regu-

Id.; see also H.R. REP. NO. 807, 93d Cong., 2d Sess. 4676 (1974), reprinted in 1974 U.S.C.C.A.N. 4670, 4676 ("One of the most important matters of public policy facing the nation today is how to assure that individuals who have spent their careers in useful and socially productive work will have adequate income to meet their needs when they retire."); Snyder, *supra* note 2, at 219.

¹⁷⁵ See *infra* note 249 (discussing legislative history which suggests Congress did not intend to protect benefits of criminals at expense of employers).

¹⁷⁶ See *supra* note 2 (discussing these ERISA policies). If an embezzler and his dependents become wards of the state and suffer an indigent retirement age because their retirement benefits were consumed to recompense other law-abiding pensioners who suffered as a result of the embezzler's deed, then so be it. Perhaps that is the price of having led a nefarious but, no doubt, luxurious preretirement lifestyle.

¹⁷⁷ See *supra* part III.D. (offering hypothetical illustrating way pension plans are injured). An employer that maintains a profit-sharing plan has fewer profits to contribute to the plan when an employee has embezzled from it. Furthermore, even when an employee maintains a pension fund other than a profit-sharing plan, the fund's beneficiaries are still damaged by an embezzlement because employers often make matching contributions. See LANGBEIN & WOLK, *supra* note 1, at 209 (discussing matching contributions).

¹⁷⁸ Naturally, a conforming amendment to ERISA's anti-alienation rule's sister provision in the IRC should be enacted. See I.R.C. § 401(a)(13) (West Supp. 1994).

lations that seem to have acquired the force of law.¹⁷⁹ Inclusion of this language in the anti-alienation provision is recommended to foreclose any plain meaning argument,¹⁸⁰ and to quiet any lingering dispute regarding whether the anti-alienation rule precludes both voluntary and involuntary attachments of pension benefits.¹⁸¹ Both the plain meaning argument and attachment issues remained unanswered after the enactment of ERISA, and their resolution required creative judicial reasoning because of the scant legislative history on the purpose of the anti-alienation rule.¹⁸² The language, "either before or after receipt by a beneficiary of such plan," is taken from section 5301(a) of the Veterans' Benefits Act ("VBA"),¹⁸³ and is intended to mandate that pension benefits paid and received are to obtain protection, as they do under both the VBA and the Social Security Act.¹⁸⁴ Its inclusion would resolve the problem created by the Tenth Circuit's decision in *Guidry v. Sheet Metal Workers International Ass'n, Local No. 9*,¹⁸⁵ wherein the court held that the anti-alienation rule does not protect benefits paid and received. It appears to make little sense to adopt a system such as ERISA, which affords as much as four decades of pre-retirement protection to pension benefits to ensure that an employee and his dependents have adequate retirement resources, but suspends that protection when that employee goes to use them in his retirement years.¹⁸⁶

¹⁷⁹ See Treas. Reg. § 1.401(a)-13(b)(1).

¹⁸⁰ See *Employee Theft and ERISA*, *supra* note 17, at 328 n.64. (discussing argument that because "Congress failed to specifically proscribe garnishment in section 105(d) while doing so in other comparable statutes," garnishment is permissible).

¹⁸¹ See *General Motors Corp. v. Buha*, 623 F.2d 455, 460 (6th Cir. 1980) (holding that section 1056(d)(1) precludes both voluntary and involuntary attachment; describing both rational and counter argument).

¹⁸² See *supra* note 7 (discussing legislative history of rule).

¹⁸³ See 38 U.S.C. § 5501(a) (Supp. V 1993).

¹⁸⁴ See *supra* note 151 (citing protective language in Social Security Act).

¹⁸⁵ See *supra* part III.C.

¹⁸⁶ See *supra* note 155 (dealing with garnishment of pension benefits already paid to participant); see also *Guidry v. Sheet Metal Workers Int'l Ass'n, Local No. 9*, 10 F.3d 700, 716 (10th Cir. 1993) (acknowledging that garnishment of pension benefits paid and received "may thwart Congress' intent"), *modified*, 39 F.2d 1078 (10th Cir. 1994) (en banc).

2. The Criminal Fraud Addition

Section 1056(d) of ERISA should be amended by adding the following paragraph at the end:¹⁸⁷

(4)(A) Paragraph (1) of this subsection shall not apply if an employer of a plan participant, a subrogee of a right of such employer, an employee organization, or a subrogee of a right of such employee organization, obtains a judgment, decree, or order in a state court of competent jurisdiction for an act of fraud, theft, conversion, or embezzlement committed by the plan participant which has caused a reduction of plan assets and/or a loss to the employer or employee organization, and which act forms the basis for a criminal conviction of or a guilty or *nolo contendere* plea by the plan participant. The preceding sentence shall apply only to the extent of such reduction and/or loss suffered by the plan, employer, and/or employee organization that the court determines resulted from such act of fraud, theft, conversion, or embezzlement and shall apply only when such criminal conviction or plea is final and unappealable.

This portion of the amendment would cover both the Type 2 and Type 3 nonfiduciary employee wrongdoing cases discussed previously, while excepting from its provisions Type 1 cases in which the employer seeks to recover more than the amount stolen by the participant.¹⁸⁸ *Ellis National Bank v. Irving Trust Co.*¹⁸⁹ is particularly useful as an illustration of this point.

Recall that in *Ellis, Bache & Co.* alleged that the employee had cost it over \$3,000,000 in funds that it had to pay back to its defrauded customers. Of itself, this allegation would be insufficient for recovery under the proposed amendment. It would have to be proven that the employee actually converted funds from Bache. Moreover, recovery would be limited to that amount proved stolen—not necessarily \$3,000,000.

Also covered by this portion of the amendment through the “reduction of plan assets” language are the defalcating fiduciary cases.¹⁹⁰ To avoid confusion, it may be advisable to include a passage stating that nothing in the amendment shall be deemed to

¹⁸⁷ Naturally, a conforming amendment should be made to the Internal Revenue Code sister provision to the anti-alienation rule contained in the IRC. See I.R.C. § 401(a)(13) (West Supp. 1994).

¹⁸⁸ See *supra* part III.A. (evidencing Type 1 scenario).

¹⁸⁹ 786 F.2d 466, 468 (2d Cir. 1986); see also *supra* part III.A. (describing *Ellis* as example of type 3 case)

¹⁹⁰ 190. See *supra* notes 71-73 and accompanying text (discussing *Herberger*, *Coar*, *Solmsen*, and *Crawford*).

limit the effect of the fiduciary breach remedial provisions contained in ERISA.¹⁹¹

The subrogee language is included in deference to the McCarran-Ferguson Act,¹⁹² which provides that insurance industry regulation is generally a matter for the states,¹⁹³ and that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating *the business of insurance*."¹⁹⁴ ERISA defers to the McCarran-Ferguson Act through its preemption "savings clause,"¹⁹⁵ and the Supreme Court has interpreted the phrase "business of insurance" to include the regulation of the substantive terms of insurance contracts.¹⁹⁶ As subrogation clauses are often included in insurance contracts, it seems wise to expressly provide for their effectuation in the amendment. Certainly insurers would bring claims as subrogees of employers,¹⁹⁷ and employee-wrongdoers would assert, in the absence of express subrogee language, that only an employer is authorized to bring a claim under the amendment. Insurers might then raise a McCarran-Ferguson argument. Inclusion of the subrogee language is intended to foreclose this possibility.

Apart from McCarran-Ferguson deference, it seems that omitting a right of subrogation from any criminal fraud amendment would deter insurers from underwriting policies for employers. This would in turn be detrimental to the security of the ERISA pension system. Insurance coverage promotes the finan-

¹⁹¹ See *supra* note 74 (discussing fiduciary breach remedial provisions).

¹⁹² 15 U.S.C. §§ 1011-1015 (1988).

¹⁹³ 15 U.S.C. § 1012(a).

¹⁹⁴ 15 U.S.C. § 1012(b) (emphasis added).

¹⁹⁵ 29 U.S.C. § 1144(b)(2)(A) (1988); see *supra* note 8 (discussing ERISA saving clause).

¹⁹⁶ *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 742-43 (1985). The *Metropolitan Life* Court outlined the following three tests to determine whether particular insurance practices fall within the "business of insurance" language of the McCarran-Ferguson Act: "[F]irst, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry." *Id.* at 743. (quoting *Union Labor Life Ins. Co. v. Piriena*, 458 U.S. 119, 129 (1982)) (emphasis in original) (citations omitted). "Application of these principles suggests that mandated-benefit laws are state regulation of the business of insurance." *Id.*

¹⁹⁷ See *St. Paul Fire & Marine Ins. Co. v. Cox*, 752 F.2d 550, 551 (11th Cir. 1985) (dealing with situation in which defrauded employer received insurance proceeds, and insurer brought claim to attach pension benefits pursuant to right of subrogation).

cial stability of the employer and, somewhat less directly, the stability of the pension plan.

The terms "employer" and "employee organization" contained in this portion of the amendment are defined terms under ERISA.¹⁹⁸ Because the definition of "employer" probably would not include the labor union that was the plaintiff in *Guidry* and of which *Guidry* was a member, the term "employee organization" is included to cover defrauded unions and other similar organizations.

Finally, other commentators have insisted that any amendment contain language to the effect that any remedy pursued thereunder must be one of last resort, i.e., other garnishable assets of the defalcator must first have been pursued and exhausted before the amendment's remedy is invoked.¹⁹⁹ Such language has not been included here because it is deemed unnecessary. In each of the employee wrongdoing cases discussed in this Note, it may be readily inferred that the only substantial asset to which the employee had legal title was his pension benefits. Furthermore, in these cases, the judgments entered were generally well in excess of the total pension benefits.²⁰⁰ Therefore, if the employee did possess assets other than his pension benefits, surely the employer would have already sought to attach such assets as they would not be encumbered with a congressionally mandated alienation prohibition to complicate or, after *Guidry*, stifle the employer's restitution attempts. Lastly, in the cases in which the judgment amount is less than the existing balance of the pension benefits, substantial early withdrawal penalties could be imposed upon the wrongdoer.²⁰¹ There exists, therefore, a strong incentive for the employee to voluntarily "cough up" any existing nonpen-

¹⁹⁸ See 29 U.S.C. §§ 1002(4), 1002(5) (1988).

¹⁹⁹ See *Employee Theft and ERISA*, *supra* note 17, at 340; *Strengthening ERISA's Protection*, *supra* note 17, at 355.

²⁰⁰ See *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 368 (1990) (judgment entered against plan trustee for \$275,000); *United Metal Prod. v. National Bank*, 811 F.2d 297 (6th Cir. 1987) (describing employee whose pension account contained \$35,385.64, but against whom \$441,408.72 judgment was entered for defrauding employer), *cert. dismissed*, 485 U.S. 1017 (1988); *Ellis Nat'l Bank v. Irving Trust Co.*, 786 F.2d 461, 469 (2d Cir. 1986) (describing pension plan account containing \$144,538.61 under savings plan and more than \$33,000 under supplementary plan for employee against whom judgments totaling \$210,430.46 were entered).

²⁰¹ See I.R.C. § 72(t)(1)-(2)(A)(i) (1988 & Supp. V 1993) (requiring 10% penalty for distributions occurring before participant reaches age 59 1/2).

sion assets hidden or otherwise placed outside the judgment's purview.

3. The Killer-Law Addition

Section 1056(d) of ERISA should be amended by adding the following paragraph at the end:

(4)(B) Paragraph (1) of this subsection shall not apply to a judgment, decree, or order entered in a state court of competent jurisdiction which divests a surviving spouse of rights to a qualified joint and survivor annuity and/or qualified pre-retirement survivor annuity, provided that such surviving spouse has been convicted of or has pled guilty to the intentional, willful, or deliberate killing of his or her plan participant spouse in a state court of competent jurisdiction, and such conviction or plea is final and unappealable.

This paragraph would foreclose any possibility that a murderer might be able to enjoy the pension benefits of a spouse that he or she has killed. Although the courts that considered the issue have held that the individual should not receive the benefits,²⁰² the exception should be codified. ERISA's policy of securing funds for use by the participant and his dependents in their retirement years does not operate and would not be served when a dependent intentionally, willfully, or deliberately killed his or her plan participant spouse. The Amendment, however, would not apply to a person convicted of the criminally reckless or criminally negligent homicide of his or her ERISA spouse as, for example, when a wife is driving a car in which her ERISA-participant husband is killed because of the wife's criminally negligent driving. The wife's QPSA entitlement should be protected in this instance, as would be a plan participant's interest if he were found guilty of criminally negligent actions.²⁰³

4. Conforming Amendments to ERISA's Preemption Provision

Section 1144(b) of ERISA should be amended by adding the following paragraph:

²⁰² See *supra* note 54 (discussing cases which prohibit person who murders spouse from receiving pension benefits of spouse).

²⁰³ See *Guidry*, 493 U.S. at 376 (holding judicial exception to ERISA's anti-alienation rule for criminal conduct is inappropriate given congressional policy choice "to safeguard a stream of income for pensioners").

(9) Subsection (a) shall not apply to any state court judgment, decree, or order prescribed in sections 1056(d)(4)(A) or 1056(d)(4)(B) of this title unless such judgment, decree, or order is used to effectuate the remedial provisions of such sections.

This paragraph is included to make it clear that the foregoing amendments shall not be construed to allow any entities, other than those listed in the amendment, to avail themselves of the remedial provisions stated therein. This would foreclose the remote possibility of creating "a boundless endless stream of suits and disputes"²⁰⁴ in the ERISA pension area, which was the primary reason judges offered for refusing to impose a criminal fraud exception.

V. CONGRESSIONAL RELUCTANCE

The proposed legislative amendment, while sufficient to clarify the area and address payment inequities, cannot be effective if it is not enacted. It is essential, therefore, for the Supreme Court to be able to create a judicial exception because, for the reasons that follow, Congress is reluctant to act.

There are several probable reasons for Congress' inaction. First, it is too busy to expend the time to correct an injustice that is adjudicated so infrequently. In the twenty years since ERISA's enactment, the federal courts have considered a mere ten cases involving employee fraud.²⁰⁵ In five of them, the courts have found a way to attach the employees' pension benefits.²⁰⁶ This statistic, however, fails to consider the inestimable number of employers that decide not to pursue a restitution remedy in the

²⁰⁴ *Vink v. SHV N. Am. Holding Corp.*, 549 F. Supp. 268, 273 (S.D.N.Y. 1982).

²⁰⁵ Four of the cases involved defalcating fiduciaries, see *supra* part II.D.2. (discussing *Crawford*, *Coar*, *Solmsen*, and *Herberger*), and six involved the criminal fraud of nonfiduciary-employee wrongdoers. See *supra* parts III.A., III.B. and III.C. (discussing *Vink*, *Cox*, *Ellis*, *United Metal*, *Guidry*, and *Gaudet*). *Pomeranke v. Williamson*, 478 N.W.2d 899 (Minn. 1991) was a Minnesota state court opinion and is not a true employee wrongdoing case. See *supra* note 146. Thus it is not included with these 10 cases considered by the federal courts. Similarly, although *In re Bell & Beckwith*, 5 F.3d 150 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1060 (1994) involved employee wrongdoing, the Sixth Circuit did not invoke the anti-alienation rule because the pension funds that the trustee in bankruptcy would recoup were really not pension funds at all as those contributions were deemed *void ab initio*. See *supra* note 146 (discussing *Pomeranke* and *Bell & Beckwith* in greater detail).

²⁰⁶ See *supra* part II.D.2. (discussing *Crawford*, *Coar*, and *Solmsen*, which permitted attachment of breaching fiduciary's pension benefits); part III.A. and note 106 (discussing *Cox* which permitted attachment of nonfiduciary employee-wrongdoer's pension benefits).

courts because of the formidable impediment the anti-alienation rule presents to recovery, in addition to the legal expenses an employer would incur to litigate such a case.

Second, proliferating divorce²⁰⁷ and child support payment delinquency rates²⁰⁸ virtually compelled Congress to act in 1984 to correct the injustices that occurred when some courts construed the anti-alienation rule to exclude former spouses and dependents from sharing in the breadwinner spouse's pension proceeds.²⁰⁹ In comparison, although the wrongdoer cases arise relatively infrequently, they nevertheless result in manifest injustices by allowing a wrongdoer to keep pension funds at the expense of other plan participants and their dependents.

Third, the Treasury Department, the administrative agency charged with enforcing and interpreting the anti-alienation rule, is unlikely to lobby for change.²¹⁰ The Treasury Department, de-

²⁰⁷ See Langbein & Wolk, *supra* note 1, at 434 (quoting *Pension Equity for Women: Hearings before the Subcomm. on Labor Management Relations of the House Comm. on Education and Labor*, 98th Cong., 1st Sess. 26 (1983) (statement of Congresswoman Geraldine Ferraro)). Congresswoman Ferraro stated

Women are shortchanged by private pension plans because the system does not truly recognize the contributions that women make to the economy or take into account women's unique work patterns, patterns which revolve around childrearing and other family responsibilities. [The homemaker] is dependent on her husband and his earnings and at the mercy of death or divorce.

Id.; *Surge in Divorces: New Crisis in Middle Age*, U.S. NEWS & WORLD REPORT, Dec. 20, 1976, at 56 ("[T]he number of divorced and separated Americans 45 years and older was 4.4 million [in 1974], nearly twice as many as ten years earlier.").

²⁰⁸ See Camilla E. Watson, *Broken Promises Revisited: The Window of Vulnerability for Surviving Spouses Under ERISA*, 76 Iowa L. Rev. 431, 473 n.295. (1991) ("Statistics showed that 25% to 33 1/3% of men never paid any child support and only about 10% paid on time and in full."); see also David Whitman, *New State Laws Seek to Bolster Child-Support Payments; The Children Who Get Cut Out*, U.S. NEWS & WORLD REPORT, Oct. 12, 1987, at 24 ("Among all families with absent fathers almost 60 percent received no child support in 1985"); Lynn Langway et al., *Rounding Up Delinquent Dads*, NEWSWEEK, Aug. 6, 1984, at 76 ("[A]ccording to the recent Census Bureau report, more than half of the 5.4 million women and children who are supposed to be receiving aid get less than their court ordered due; 28 percent or nothing.").

²⁰⁹ See *supra* part II.A.3. (discussing division among courts on whether there was exception to anti-alienation rule for family support judgments prior to enactment of REA in 1984).

²¹⁰ Although the Secretary of Labor is broadly authorized to interpret ERISA and promulgate regulations thereunder, see 29 U.S.C. § 1135, "the authority of the Department of Labor to issue regulations under ERISA's [anti-alienation provision] is . . . lodged in the Department of the Treasury." *Guidry v. Sheet Metal Workers Int'l Ass'n*, Local No. 9, 10 F.3d 700, 709 (10th Cir. 1993), *modified*, 39 F.2d 1078 (10th Cir. 1994) (en banc); accord *Hurwitz v. Sher*, 982 F.2d 778, 779 n.1. (2d Cir. 1992), *cert.*

spite reinforcing the anti-alienation provision by promulgating regulations,²¹¹ is exempt by virtue of the supremacy clause from its own prohibition against attaching an employee's pension benefits through the garnishment process.²¹² Thus, the Treasury has little incentive to advocate an exception for employee wrongdoing.

Fourth, the most egregious cases evidencing the need for an exception to the anti-alienation provision, those that would virtually compel congressional attention, have not reached the circuit courts. In two such cases, the plaintiff-wrongdoers failed to raise an anti-alienation argument. In a third, a district court inappositely construed ERISA's provisions to avoid a harsh result. In *Mendez-Bellido v. Board of Trustees of Division 1181, A.T.U.*,²¹³ Carlos Mendez, an ERISA plan participant, was killed by his second wife who was then convicted of first-degree manslaughter.²¹⁴ As one of Carlos' surviving spouses, his second wife possessed the right to a qualified preretirement survival annuity ("QPSA") and was therefore entitled to receive Carlos' pension benefits beginning at the time he would have reached age fifty-five.²¹⁵ Carlos' first wife made a claim on behalf of her children for the benefits provided under the plan. The pension fund's appeal board denied her claim based on Carlos' second wife's entitlement to the

denied, 113 S. Ct 2345 (1993). See generally *Guidry-Local No. 9*, 10 F.3d at 708-09 (explaining confusion over who had authority to issue regulations under anti-alienation rule and resolving issue in Treasury Department's favor).

Recall that in 1979 the Secretary of Labor filed suit in *Winer v. Edison Bros. Stores Pension Plan*, 593 F.2d 307 (8th Cir. 1979), to help employees accused of receiving illegal kickbacks retain their pension benefits. See *supra* note 98. The court in *Vink v. SHV N. Am. Holding Corp.*, 549 F. Supp. 268 (S.D.N.Y. 1982) subsequently interpreted *Winer* to mean that the DOL disfavored the recognition of any criminal fraud exception to ERISA. See *id.* at 271-72. As is pointed out in footnote 98, *Winer* involved an employer that refused to pay pension benefits to an employee that it merely accused of having received kickbacks—a typical “bad boy” forfeiture. On the other hand, *Vink* and the wrongdoing cases herein discussed involved employees who had been convicted in a state court of criminally defrauding their employers. See *id.*; see also *supra* part III. It cannot be said, therefore, that the DOL opposed a criminal fraud exception to the anti-alienation rule in a situation in which there has been a criminal adjudication of guilt with due regard for every notion of fairness and due process as required by the Constitution.

²¹¹ See *supra* note 7 (citing text of Treas. Reg. § 1.401(a)-13(b)(1), which reinforces anti-alienation rule by disqualifying plan from special tax treatment if it is assignable or alienable).

²¹² See *supra* part II.A.4. (explaining that federal tax liens are exempt from anti-alienation provision).

²¹³ 709 F. Supp. 329 (E.D.N.Y. 1989).

²¹⁴ *Id.* at 330.

²¹⁵ *Id.*; see *supra* note 42 (relating to how REA protects QPSAs).

QPSA.²¹⁶ The court held, however, that Carlos' second wife was precluded from receiving the pension benefits based on "*New York law*" which "prohibit[s] a killer from profiting from her [own] crime."²¹⁷

Similarly, in *New Orleans Electrical Pension Fund v. De-Rocha*,²¹⁸ the court, relying heavily on *Mendez-Bellido*, held that a surviving spouse who had shot and killed her husband was precluded from receiving a QPSA. The court based its decision on the equitable doctrine that a wrongdoer should not profit from his or her own crime.²¹⁹

The results in these two cases are patently fair and consistent with the socially desirable outcome advocated in this Note. It is suggested, however, that the results reached by these courts cannot be reconciled with *Guidry*. Each court deliberately skirted the fact that ERISA preempts state law "relat[ing] to any employee benefit plan."²²⁰ The *Mendez-Bellido* court's rationale for creating this implied exception was based on decisions involving state insurance law, wherein courts refused to allow beneficiaries convicted of murdering the insured to receive insurance proceeds,²²¹ and state testamentary law, which forbids one who slays another from taking under his will or through intestacy.²²² These decisions are distinguishable. Unlike a life insurance policy, under which a killer-beneficiary gets the proceeds from the policy immediately, the earliest the surviving spouses in *DeRocha* and *Mendez-Bellido* could have received the decedents' benefits, had they been awarded their entitlement under the QPSAs, was at the de-

²¹⁶ *Mendez-Bellido*, 709 F. Supp. at 330.

²¹⁷ *Id.* at 331 (emphasis added). In reaching this decision, the court had to find, and did find, that ERISA does not preempt the state common law rule that prohibits one from profiting from his own crimes. *Id.*

²¹⁸ 779 F. Supp. 845 (E.D. La. 1991).

²¹⁹ *Id.* at 849-50.

²²⁰ See 29 U.S.C. § 1144(a); see also *supra* note 8 (discussing preemption).

²²¹ *Mendez-Bellido*, 709 F. Supp. at 332-33.

²²² *Id.* at 330; see *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889). One of the arguments for reforming a will to preclude a beneficiary who has murdered a testator from benefiting was that the testator harbored an implied wish that a beneficiary who had killed him would not take under his will. In contrast, a plan participant's implied wish, or any other desire, is rendered irrelevant by the terms of the statute, as Congress has made the public policy choice that after one year of marriage a spouse cannot be divested of her entitlement without her consent within the applicable waiver period. Thus, the *Mendez-Bellido* court's analogy is misplaced and inappropriate.

cedents' minimum retirement age of fifty-five.²²³ Furthermore, unlike a life insurance policy, under which the insured can change designated beneficiaries at his or her option, or a will, in which beneficiaries can be freely supplanted, a qualified retirement plan requires that a surviving spouse entitled to a QPSA relinquish that entitlement only if the spouse consents in a notarized writing²²⁴ within an ERISA-mandated election period.²²⁵

The import of the foregoing is that, unlike the insurance and will scenarios in which the decision to kill a spouse may often be fueled by a desire to receive money before the killer ordinarily would have, or to prevent the insured from changing his beneficiary or a testator from changing her will, the decision to kill an ERISA plan participant does not stem from a desired increase or acceleration of the benefit the nonparticipant spouse can or will receive. The surviving "ERISA spouse" must wait to receive the benefits and cannot, without granting consent, be stripped of her survivor's share. Thus, the surviving spouses in *DeRocha* and *Mendez-Bellido* did not "profit" from their crimes at all, and under the circumstances of the two cases, application of the doctrine that a wrongdoer should not profit from her own crime is misplaced. To be sure, these are tenuous distinctions. But when coupled with the fact that ERISA, unlike insurance or testamentary law, contains preemption and anti-alienation provisions, which are equally applicable to surviving spouses as they are to initial plan participants,²²⁶ the exceptions created in *DeRocha* and *Mendez-*

²²³ See 29 U.S.C. § 1055(e)(1)(B) ("[T]he earliest the surviving spouse may receive a payment under . . . [a QPSA] is not later than the month in which the participant would have attained the earliest retirement age under the plan.").

²²⁴ See 29 U.S.C. § 1055(c)(2)(A)(iii); e.g., *United Parcel Serv. v. Riley*, 532 N.Y.S.2d 473, 474 (Sup. Ct. Suffolk County 1988) (stating that beneficiary change can be effected only by written spousal consent). But see *Watson*, *supra* note 208, at 500 (noting possible exception for spousal abandonment).

²²⁵ See 29 U.S.C. § 1055(c)(7)(B) (defining the "applicable election period to begin on the first day of the plan year in which the participant attains age 35").

²²⁶ It appears that no court has directly considered the issue of whether the provisions are equally applicable to spouses because the anti-alienation rule's applicability to surviving spouses is unquestioned. Elemental deduction based on the plain meaning of the anti-alienation provision leads to this conclusion. The rule states that "benefits provided under the plan" are to receive alienation protection. 29 U.S.C. § 1056(d)(1) (1988). The rule does not limit its application to plan participants. Since benefits provided to a surviving spouse under a QPSA are derived from plan assets, they are indeed "benefits provided under the plan" within the plain meaning of the rule. Thus, they must be benefits to which alienation protection is afforded. Furthermore, although no party to the suit in *New Orleans Elec. Pension Fund v. Newman*,

Bellido cannot be reconciled with ERISA's provisions as construed by the Supreme Court in *Guidry*.

Furthermore, the plaintiffs in *DeRocha* and *Mendez-Bellido* were the pension plans, and the surviving spouses who were denied otherwise guaranteed retirement benefits did not appear.²²⁷ As a result, neither plaintiff raised the argument that because the benefits under the QPSA were not to be paid out to the surviving spouse until the decedent would have reached retirement age, the anti-alienation rule of ERISA continued to apply to the surviving spouse and, therefore, she could not be stripped of those benefits.²²⁸

By contrast, in *New Orleans Electrical Pension Fund v. Newman*,²²⁹ although a killer-beneficiary raised an anti-alienation argument,²³⁰ the court held that she was to be stripped of her QPSA entitlement.²³¹ While just, this decision cannot be reconciled from a statutory interpretation standpoint with ERISA's preemption and QPSA waiver provisions or the Supreme Court's decision in *Guidry*.

Mrs. Newman, who had killed her ERISA participant spouse, was entitled to receive a \$3,000 death benefit payable immediately and a QPSA, which was to begin not before her spouse would have reached retirement age.²³² Thus, the anti-alienation rule was applicable to Mrs. Newman's receipt of the QPSA.²³³ Although the \$3,000 death benefit payment was the fruit of Mrs. Newman's crime, the QPSA could not be considered as such because it was to begin on the date Mr. Newman would have reached his earliest retirement age—a date not accelerated by his death.²³⁴ Nevertheless, the court stripped Mrs. Newman of the QPSA as well.²³⁵

784 F. Supp. 1233 (E.D. La. 1992) contested this issue, the court assumed that the rule applies to surviving spouses. *See id.* at 1236-37.

²²⁷ *Mendez-Bellido v. Board of Trustees of Division, 1181, A.T.U.*, 709 F. Supp. 329, 330 n.1 (E.D.N.Y. 1989); *New Orleans Electrical Pension Fund v. DeRocha*, 779 F. Supp. 845, 848 (E.D. La. 1991).

²²⁸ *See Mendez-Bellido*, 709 F. Supp. at 333 (noting pension fund's neglect in failing to submit reply papers).

²²⁹ 784 F. Supp. 1233 (E.D. La. 1992); *see also supra* note 54 (listing additional cases).

²³⁰ *See Newman*, 784 F. Supp. at 1236.

²³¹ *Id.* at 1238; *see also supra* note 54 (discussing court's reasoning).

²³² *Newman*, 784 F. Supp. at 1236-37.

²³³ *See id.*

²³⁴ *See supra* notes 223-28 and accompanying text (discussing this assertion).

²³⁵ *Newman*, 784 F. Supp. at 1237.

In reaching its conclusion, the court made three broad observations. First, the court observed that state killer laws are not preempted by ERISA.²³⁶ Second, even assuming *arguendo* that state killer laws are preempted, neither the anti-alienation rule nor *Guidry* is offended by its holding.²³⁷ And third, the court found that a Louisiana civil law finding that Mrs. Newman is an "unworthy heir" constitutes a valid waiver of a QPSA because it is tantamount to abandonment, which the Treasury Regulations state is a valid waiver.²³⁸ It is suggested, however, that none of these conclusions can be supported by ERISA's provisions as construed by the various federal courts.

First, state testamentary law, which encompasses state killer laws, is preempted by ERISA.²³⁹ Second, the court's determination that Mrs. Newman's QPSA could be waived by analogy to abandonment as defined in the Treasury Regulations was based on an IRS Private Letter Ruling,²⁴⁰ which by the court's own admission has no precedential value.²⁴¹ Third, the *Newman* decision offends the *Guidry* Court's sweeping pronouncement that there are no exceptions for criminal conduct to ERISA's anti-alienation rule.²⁴² The Supreme Court has stated:

A court attempting to carve out an exception that would not swallow the [anti-alienation] rule would be forced to determine whether application of the rule in particular circumstances would be "*especially inequitable*." The impracticability of defining such a standard reinforces our conclusion that the identification of *any* exception should be left to Congress.²⁴³

²³⁶ *Id.* at 1236.

²³⁷ *Id.* at 1236-37.

²³⁸ *Id.* at 1237-38.

²³⁹ *Maclean v. Ford Motor Co.*, 831 F.2d 723, 728 (7th Cir. 1987); *Iron Worker's Mid-South Pension Fund v. Stoll*, 771 F. Supp. 781, 785 (E.D. La. 1991); see *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 98 (1983) (ERISA's preemption language designed to implement broadest possible interpretation); *E-Systems, Inc. v. Pogue*, 929 F.2d 1100, 1103 (5th Cir. 1991) ("Reflective of the broad reach of the statute, the Supreme Court has found preemption of state laws which only collaterally or indirectly affected employee benefit plans."), *cert. denied*, 112 S. Ct. 585 (1991). But see *Ridgway v. Ridgway*, 454 U.S. 46, 60 (1981) (stating that although Servicemen's Group Life Insurance Act and beneficiary designation override state law, there could exist "extreme fact situations or . . . instances where the beneficiary has obtained the proceeds through fraudulent or illegal means as, for example, where the named beneficiary murders the insured service member").

²⁴⁰ *Newman*, 784 F. Supp. at 1238 n.9.

²⁴¹ *Id.*

²⁴² *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990).

²⁴³ *Id.* at 377 (emphasis added).

One would be hard pressed to envision what could be more "especially inequitable" than allowing a wife who has killed her husband to enjoy his pension benefits. Nevertheless, the Supreme Court has said that especially inequitable circumstances are the province of Congress and not the judiciary.

Obviously, because of their bizarre and tragic circumstances, cases like *Mendez-Bellido*, *DeRocha*, and *Newman* arise infrequently. The courts, however, were hard pressed to reconcile the ERISA provisions so tightly embraced by the *Guidry* Court with the inconsistent but socially desirable results they themselves reached. If one accepts the *Guidry* Court's interpretation that Congress intended to safeguard the pension benefits of a scurrilous embezzler for use by him and his dependents during his retirement years, it is not such a stretch to believe that the Supreme Court would have also found that Congress intended that a surviving spouse, incarcerated for the manslaughter of her long-time abusive husband,²⁴⁴ should have her congressionally mandated share available for use by her and her dependents in her retirement years. After all, even a spouse convicted of manslaughter, like an embezzler, eventually will be freed and will experience retirement needs.²⁴⁵ Finally, the unlikelihood that another such case will arise and perhaps require that a murderer receive the victim's pension benefits is further reason why Congress is unlikely to act to create a statutory exception such as the one proposed herein.

VI. THE SUPREME COURT SHOULD RECONSIDER ITS POSITION

Congressional reluctance raises a fundamental question: Did Congress really intend, as the Supreme Court's refusal to carve out an equitable exception for criminal fraud suggests, to promote the right of a criminal and his family members to enjoy stolen property?²⁴⁶ It is suggested that the Supreme Court's refusal ef-

²⁴⁴ See James Endrst, 'Confessions of Crime' Opens Lineup; Lifetime Cable Introduces Three Original Series, HARTFORD COURANT, July 19, 1991, at 16 (noting that wife in *Mendez-Bellido* was victim of abuse by husband).

²⁴⁵ See *Mendez-Bellido v. Board of Trustees*, 1181, A.T.U., 709 F. Supp. 329, 330 (E.D.N.Y. 1989) (wife sentenced to only two-to-six-year term of imprisonment); *New Orleans Elec. Pension Fund v. DeRocha*, 779 F. Supp. 845, 846 (E.D. La. 1991) (surviving spouse sentenced to ten years hard labor but sentence reduced to five years probation); *New Orleans Elec. Pension Fund v. Newman*, 784 F. Supp. 1233, 1234 (E.D. La. 1992) (wife sentenced to fifteen years).

²⁴⁶ See LANGBEIN & WOLK, *supra* note 1, at 457; SCOTT, *supra* note 7, § 157.5, at 220 ("[T]here seems to be something rather shocking in the notion that a man should

fectively defeats use in the ERISA pension area of the ancient equitable doctrine that a wrongdoer should not profit from his crime.²⁴⁷ If this were in fact Congress' intention, which its inaction could lead us to believe, the Supreme Court would be completely justified in refusing to sustain the implied exception several judges saw fit to create.²⁴⁸ It is submitted that such could not have been Congress' intention. There is no doubt that those members of Congress who enacted ERISA chose to protect individuals who contributed to, rather than harmed, society.²⁴⁹ Indeed, for this reason, the equitable doctrine continues to live and breathe in the federal common law.²⁵⁰

A. A Conundrum of Conflicting ERISA Policies

It is clear that Congress' policy choice was to protect the retirement income of *all* plan participants, including wrongdoers, as the Supreme Court and other courts that refused to create implied exceptions for criminal fraud make clear.²⁵¹ It is suggested, however, that in precluding the union from recovering on behalf of its members the funds stolen by Guidry, the *Guidry* Court is vulnerable to the argument that not *all* plan participants and their dependents are being protected. When an ERISA participant who is not found to have breached a fiduciary duty owed to the plan under

be allowed to continue in the enjoyment of property without satisfying the claims of persons whom he has injured.”).

²⁴⁷ See *New York Mutual Life Ins. Co. v. Armstrong*, 117 U.S. 591, 600 (1886) (“It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of the party whose life he had feloniously taken.”).

²⁴⁸ See *St. Paul Fire & Marine Ins. Co. v. Cox*, 752 F.2d 550, 552 (11th Cir. 1985) (*per curiam*) (finding criminal misconduct exception to non-alienability provision of ERISA); *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 856 F.2d 1457 (10th Cir. 1988), *rev'd*, 493 U.S. 365 (1990); *cf.* *United Metal Prods. Corp. v. National Bank of Detroit*, 811 F.2d 297, 300-01 (6th Cir. 1987) (Wellford, C.J., dissenting).

²⁴⁹ The House Ways and Means Committee remarked that “[o]ne of the most important matters of public policy facing the nation today is how to assure that individuals who have spent their careers in *useful and socially productive work* will have adequate incomes to meet their needs when they retire.” H.R. REP. NO. 807, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.A.N. 4670, 4676 (emphasis added). Embezzlers do not do useful or socially productive work. Their “work” is useful only with respect to themselves and perhaps their dependents, who may or may not be blameless or who share, albeit unwittingly, in the spoils of the embezzler’s crime. Furthermore, embezzlement is socially destructive. This analysis seems to lead to the conclusion that embezzlers and the like were not meant to be protected by Congress.

²⁵⁰ See *infra* note 256 (discussing federal common law).

²⁵¹ See, e.g., *Vink v. SHV N. Am. Holding Corp.*, 549 F. Supp. 268, 273 (S.D.N.Y. 1982) (“Congress has spoken, and . . . [ERISA] makes [it] clear that the pension benefits of both faithless employees . . . and faithful ones are to be protected.”).

ERISA, as in *Guidry*, steals funds from either the plan itself or the employer—thereby reducing the employer's ability to contribute to the plan—²⁵² and there is no exception recognized, the ERISA policy of protecting *all* participants and their dependents cannot be served, as it is at odds with the policy announced by the Supreme Court of protecting even the wrongdoer's and his dependents' retirement benefits. In other words, disallowing the exception helps the wrongdoer and his dependents and hurts the plan and its beneficiaries, while creating the exception protected the plan and its beneficiaries but hurts the wrongdoer and his dependents. Obviously, Congress' intent, which according to *Guidry* was to protect *all*, cannot be saved. The *Guidry* decision, and indeed all the employee wrongdoing decisions that refused to adopt a criminal fraud exception, create a "Catch 22" of conflicting ERISA policies, and illustrate the way that the search for congressional intent can lead to irreconcilable results in the employee wrongdoing area.

Accordingly, the judicially interpreted exception advocated herein is limited, like the criminal fraud amendment proposed herein, to those cases in which either the plan sponsor or the plan itself has been thieved. Of course, the adjudication that the alleged wrongdoer was in fact that thief would be a *sine qua non* to any recovery.²⁵³

B. Federal Common Law—A Vehicle for Equity

The vehicle by which the judicially created exception could be implied is the federal common law. The doctrine that a wrongdoer should not profit from his crime is firmly embedded in the deepest traditions of not only state but federal common law.²⁵⁴

²⁵² See *supra* part III.D. (offering hypothetical that demonstrates harm to beneficiaries of pension plan).

²⁵³ See generally *United States v. Gaudet*, 966 F.2d 959 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1294 (1993); *United Metal Prods. Corp. v. Naitonal Banks of Detroit*, 811 F.2d 297, 300 (6th Cir. 1987) (reciting facts in which such exception would apply); *Ellis v. Nat'l Bank v. Irving Trust Co.*, 786 F.2d 466, 469 (same); *St. Paul Fire and Marine Ins. Co. v. Cox*, 752 F.2d 550 (11th Cir. 1985) (same); *General Motors Corp. v. Buha*, 623 F.2d 455 (6th Cir. 1980) (same); *Mills v. Mills*, 790 F. Supp. 172, 177 (S.D. Ohio 1992) (same); *Vink v. SHV N. Am. Holding Corp.*, 549 F. Supp. 268 (S.D.N.Y. 1982) (same); *Pomeranke v. Williamson*, 478 N.W.2d 800, 801 (Minn. Ct. App. 1991) (reciting facts in which such exception would not apply because neither plan nor sponsor was thieved).

²⁵⁴ See *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 151 (1968) (Marshall, J., concurring) ("The principle that a wrongdoer shall not be permitted to profit through his own wrongdoing is fundamental in our juris-prudence.");

As noted earlier, ERISA provides that "[n]othing in [its provisions] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States."²⁵⁵ Furthermore, "court[s are] empowered to formulate rules of law to govern various aspects of the employee benefit field."²⁵⁶

This seems to indicate that an implied exception based on federal common law is feasible. As the courts that created an implied exception for fraud in nonfiduciary employee wrongdoing cases, which the *Guidry* Court overruled, did not present such an argument, there is no authority to indicate that such an exception based on federal common law principles of equity would be similarly rejected.²⁵⁷ Furthermore, the arguments offered by the courts that created the implied exception to ERISA's anti-alienation rule in the family support context before the enactment of REA²⁵⁸ are no more persuasive than those for creating an implied criminal fraud exception.

The broad argument offered by the courts for creating an exception for family support judgments was that ERISA's anti-alienation and preemption provisions, as "generalized proscriptions, . . . are not sufficient to infer that Congress meant to preclude the ancient family law right of maintenance and support and the issu-

Shoemaker v. Shoemaker, 263 F.2d 931, 932 (6th Cir. 1959) (recognizing "public policy founded upon the equitable principle that no person should be permitted to profit from his own wrong"); *Prudential Ins. Co. of America v. Tull*, 690 F.2d 848, 849 (4th Cir. 1982) (citation omitted) ("Federal law recognizes that the beneficiary's claim is barred by the equitable defense: 'No person should be permitted to profit from his own wrong.'").

²⁵⁵ 29 U.S.C. § 1144(d) (1988).

²⁵⁶ *In re C.D. Moyer Co. Trust Fund*, 441 F. Supp. 1128, 1131 (E.D. Pa. 1977), *aff'd*, 582 F.2d 1273 (3d Cir. 1978); *see Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987) (quoting 120 CONG. REC. 29942 (1974) (statement of Senator Javits)) ("It is also intended that a body of Federal substantive law will be developed by the courts to deal with the issues involving rights and obligations under . . . pension plans."); *see also* RONALD J. COOKE, *ERISA PRACTICE AND PROCEDURE* § 8.04 (1989) ("[T]he courts have an obligation to create a body of federal common law concerning aspects of employee benefit plans, and the guideposts in fashioning this body of federal common law include the policies underlying ERISA and, possibly, principles of state law that are compatible with national policy."). Certainly protection of plan participants is a valid ERISA policy. Denying recovery for the employer who seeks restitution indirectly on behalf of those participants does not promote this policy while recognizing an exception would. Also, the state law policy that a wrongdoer should not profit from his own crime is surely "compatible with national policy." *Id.* at 821.

²⁵⁷ *See Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 856 F.2d 1457 (10th Cir. 1988), *rev'd*, 493 U.S. 365 (1990); *Cox* 752 F.2d at 550. *Cf. United Metal Prods. Corp. v. National Bank of Detroit*, 811 F.2d 297, 301 (Wellford, C.J., dissenting).

²⁵⁸ *Id.* at 301 (Wellford, C.J., dissenting).

ance of process to enforce that right."²⁵⁹ Equally ancient are principles of unjust enrichment, restitution, and the doctrine that a wrongdoer should not profit from his crime.²⁶⁰ The second argument posited that the area of domestic relations has been traditionally left to the states, and, therefore, Congress could not have meant to eliminate their powers to reign in this area.²⁶¹ So too has the area of criminal restitution been left to the states.²⁶² Third, "ERISA's anti-assignment or alienation sections were included only 'to protect a person and those dependent upon him from the claims of creditors,' and not to insulate a breadwinner from the valid support claims of spouse and offspring."²⁶³ It would seem equally compelling that courts not insulate an embezzler from the valid restitution claims of an employer seeking recovery on behalf of other plan participants.

There is one argument which favored the creation of an implied family support exception that is not present in the criminal fraud context. Namely, the DOL supported an implied exception for family support.²⁶⁴ Although it cannot be said that the DOL supports the creation of a criminal fraud exception, neither can it be said that it would disfavor the creation of one of the type advocated herein. Because there is no risk of "bad boy" forfeiture under the exception proposed herein, the DOL's argument against a fraud exception does not apply here, and appellate court reliance on it was and is inappropriate.²⁶⁵

Lastly, one court decried: "Until and unless Congress has made it plain that it intended the absurd, unfair and unconscionable result contended for by [those who opposed the family support exception] . . . the Court will not leave the field, and will permit the normal and routine enforcement machinery with respect to outstanding support orders to function."²⁶⁶ It seems the Supreme

²⁵⁹ *Cartledge v. Miller*, 457 F. Supp. 1146, 1154 (S.D.N.Y. 1978).

²⁶⁰ See *supra* note 254.

²⁶¹ See Michael T. Murray, Note, *The Fraud Exception to ERISA's Anti-Alienation Provision: A Permissible Exercise of the Chancellor's Powers?*, 57 FORDHAM L. REV. 835, 843 (1989).

²⁶² See Ann Haberfelde, Note, *A Reexamination of the Non-Dischargeability of Criminal Restitutive Obligations in Chapter 13 Bankruptcy*, 43 HASTINGS L.J. 1517, 1565 (1992) ("Congress felt state interests in criminal restitution were supreme.").

²⁶³ *Cartledge*, 457 F. Supp. at 1156.

²⁶⁴ *Id.*

²⁶⁵ See *supra* part I. (offering more extensive discussion of this argument).

²⁶⁶ *Cartledge v. Miller*, 457 F. Supp. 1146, 1157 (S.D.N.Y. 1978) (quoting *Cogollos v. Cogollos*, 402 N.Y.S.2d 929, 930 (Sup. Ct. N.Y. County 1978)).

Court could adopt this position and let the restitution machinery operate under the doctrine that a wrongdoer should not profit from his own crime. This seems especially viable since, unlike state family law support judgments, the equitable doctrine exists in the federal common law and thus does not present a preemption problem.²⁶⁷

Furthermore, the arguments proffered by the various courts against creating an implied exception for criminal fraud,²⁶⁸ while valid within the context in which they were decided, are inapplicable to the present discussion, as the exception is to be recognized only when the plan itself is injured, and when a court of law, not an employer seeking bad-boy forfeiture, has declared that an employee has defrauded his employer to the detriment of all plan participants.

The fraud exception proposed herein, whether realized by congressional amendment or judicial creation, would not create an endless "stream of suits and disputes" in which companies refuse to pay pension benefits to allegedly disloyal employees. On the contrary, a criminal adjudication of embezzlement or the like would be a *sine qua non* to recovery.²⁶⁹ Courts of law rather than employers would be exercising their discretion over that proceeding, and the rigors of criminal procedure and constitutionally required due process would prevent the unbridled employer "bad boy" overreaching that occurred prior to ERISA's enactment. Furthermore, embezzlement and like crimes, by their nature, rise to the level of felony, and therefore the concern that courts would not

²⁶⁷ See *supra* note 247; see also Langbein & Wolk, *supra* note 1, at 378 (suggesting courts that created implied exception for family support judgments treated preemption provision as if it only took effect in areas of "substantive or content conflict").

²⁶⁸ See, e.g., *Ellis Nat'l Bank v. Irving Trust Co.*, 786 F.2d 466, 471-72 (2d Cir. 1986).

Would the exception be available to only employers or pension plans, or also to third parties allegedly victimized, such as creditors, the government or even other employees? Would the exception withstand a charge that it would favor business tort claimants over creditors? Would it pave the way for exceptions for noncriminal fraud or conversion?

Id.; *Vink v. SHV N. Am. Holding Corp.*, 549 F. Supp. 268, 273 (S.D.N.Y. 1982). The court noted that carving out an exception "would start a boundless stream of suits and disputes in which companies refuse to pay pension benefits to allegedly disloyal employees. Courts would then have to determine whether a fraud exception should apply only to felonies or whether it should apply to misdemeanors and acts of negligence as well." *Id.*

²⁶⁹ See *supra* note 246 and accompanying text.

know whether to apply the exception to misdemeanors is misplaced. Also, third parties; other than insurers of plan sponsors acting pursuant to a right of subrogation, could not proceed with a claim under either the proposed amendment or the judicially implied exception, as such a claim would not comport with the goals of ERISA. On the other hand, limiting the exception to employers does comport with the stated goals and policies of ERISA,²⁷⁰ and thus could "withstand a charge"²⁷¹ that it favors employers over creditors and tort victims. Similar reasoning was used to protect the implied exception for family support judgments against charges that it favored a plan participant's dependents over tort victims and creditors.²⁷² As was the case in that situation, a criminal fraud exception is consistent with ERISA's policy of protecting the plan and its beneficiaries.²⁷³

Recognition of a criminal fraud exception under the limited circumstances described herein—when the employer and law-abiding plan participants are damaged by the wrongdoer's criminal actions—need not "pave the way"²⁷⁴ for any further exceptions if judges refuse to let it. Even judges who have refused to create a criminal fraud exception have expressed their confidence that the judiciary is capable of performing the balancing that would be required by recognition of such an exception.²⁷⁵

More significant, such an exception does not retard, but rather furthers, the goals of ERISA. Recognition of an exception would promote "the equitable character of . . . [ERISA pension] plans and their financial soundness"²⁷⁶ in a way existing law does not. Further, such recognition would foster "security in the workplace"²⁷⁷ and help secure the "financial soundness" of pension plans,²⁷⁸ which existing law does not. It would create "uniform national treatment of pension benefits,"²⁷⁹ whereas existing law in

²⁷⁰ See *supra* note 2 (discussing policy behind ERISA and providing factual context which compelled its passage).

²⁷¹ *Ellis*, 786 F.2d at 471.

²⁷² See *supra* note 43 and accompanying text.

²⁷³ See *supra* note 43 and accompanying text; see *supra* note 2.

²⁷⁴ *Ellis Nat'l Bank v. Irving Trust Co.*, 786 F.2d 466, 472 (2d Cir. 1986).

²⁷⁵ *United Metal Prods Corp. v. National Bank of Detroit*, 811 F.2d 297, 300 (6th Cir. 1987).

²⁷⁶ H.R. REP. NO. 307, 93d Cong., 2d Sess. 68 (1974).

²⁷⁷ *St. Paul Fire and Marine Ins. Co. v. Cox*, 752 F.2d 550, 552 (11th Cir. 1985).

²⁷⁸ 29 U.S.C. § 1001(a) (1988).

²⁷⁹ *Patterson v. Shumate*, 112 S. Ct. 2242, 2250 (1992).

the employee wrongdoer area is anything but uniform.²⁸⁰ It would even "assure that individuals who have spent their careers in *useful and socially productive work* [as opposed to embezzlers] will have adequate income to meet their needs when they retire,"²⁸¹ since employers would have at least some means to recover their losses on behalf of the plan participants. Ironically, existing law instead assures that individuals who have spent their careers in felonious and socially destructive work will have adequate income to meet their needs in retirement.

Long ago, the Supreme Court stated: "All laws should receive a sensible construction It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of [an unjust, oppressive or absurd] character."²⁸² Recently, the Court has said that this caveat of statutory construction is particularly applicable to labor legislation such as ERISA.²⁸³ If the Supreme Court has the opportunity to review another employee wrongdoing case, adherence to the wisdom of this caveat should lead it to overrule *Guidry* and to create a criminal fraud exception to ERISA's anti-alienation rule.

CONCLUSION

Congress enacted ERISA in 1974 with an eye toward ensuring that an employee and his dependents have adequate means to meet their retirement needs. In the twenty years since, enforcement of ERISA's anti-alienation provision has been a significant means of achieving this goal. It seems inconceivable, however,

²⁸⁰ See *supra* part III.D. (discussing hypothetical).

²⁸¹ H.R. REP. NO. 807, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 4670, 4676 (emphasis added).

²⁸² See *Lau Ow Bew v. United States*, 144 U.S. 47, 59 (1892) ("Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and if possible, so as to avoid an unjust or an absurd conclusion."); *Church of Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) ("It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers."); *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486-87 (1868) ("The reason of the law in such cases should prevail over its letter."); *United Metal Prods. Corp. v. National Bank of Detroit*, 811 F.2d 297, 300 (6th Cir. 1987) (citing *United States v. Rutherford*, 442 U.S. 544, 555 (1979)) ("Only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to statutory language be judicially implied.")

²⁸³ *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 619 (1967) (stating that *Holy Trinity* principle is particularly applicable to construction of labor legislation).

that Congress intended the provision to allow an employee wrongdoer, particularly one who is a pension plan fiduciary, to reap the benefits of his crime at the expense of his employer and fellow employees. Indeed, the chaotic state of employee wrongdoing law seems to indicate that Congress could not have intended such an absurd result. Legislative action is best suited to correct the injustice in the employee wrongdoing area. Congressional inaction to date need not be taken as tacit approval of the harsh result the *Guidry* Court felt compelled to reach in order to preserve the protective effect of ERISA's bar on alienation for law-abiding pensioners. Since the policy behind ERISA amply supports the creation of an implied criminal fraud exception for employee wrongdoing, should the opportunity present itself, the Supreme Court should reconsider its position and overrule *Guidry*.

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